CHAPTER 6

CALIFORNIA FAMILY RIGHTS ACT (CFRA)

LEGAL STANDARDS FOR CFRA

A. Introduction

The California Family Rights Act (CFRA) authorizes an eligible employee to take a job-protected leave of absence for up to a total of 12 work weeks in a 12-month period while continuing to receive employer-paid health, dental and vision benefits. It is unlawful for a covered employer to refuse to grant, upon reasonable request, family care and medical leave to an eligible employee, unless the refusal is legally justified under California law.[1] CFRA also safeguards an employee from discrimination, harassment or retaliation because he/she exercises his/her right to take a protected leave. The employee has a right to be reinstated to his/her same or comparable position at the conclusion of the qualifying leave.

CFRA is set forth in the Fair Employment and Housing Act (FEHA) at Government Code section 12945.2. Additionally, the Fair Employment and Housing Commission (FEHC) regulations explain and clarify CFRA. (See Cal. Code Regs., tit. 2, § 7297.0.)

Some aspects of CFRA and FEHC regulations are the same as or similar to the federal Family Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2601, et seq. and its implementing regulations. For instance, FEHC regulations incorporate FMLA's definitions of various terms and the federal regulations, by reference, to the extent that they are consistent with controlling California law.[2] For that reason, it is sometimes helpful to reference and review cases rendered by federal courts interpreting and explaining the application of those aspects of FMLA which are akin to California law.

B. Purpose of CFRA Leave[3]

"Family care and medical leave," as that term is used in CFRA, means any of the following:

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[1] Cal. Code Regs., tit. 2, § 7297.1, subd. (a).

[2] Cal. Code Regs., tit. 2, § 7297.10.

[3] An employee who has a serious health condition that also meets the definition of a physical or mental disability as those terms are defined in Government Code section 12926, subdivisions (i) and (k), may be entitled, as a reasonable accommodation, to a leave of absence that stretches beyond the 12 workweeks of leave guaranteed by CFRA. (See complete discussion in Chapter entitled "Physical or Mental Disability or Medical Condition.")

1. Leave for reason of the birth of a child of the employee, the placement of a child with an employee in connection with the adoption or foster care of the child by the employee or the serious health condition of a child of the employee.

2. Leave to care for a parent or spouse who has a serious health condition.

3. Leave because of an employee's own serious health condition that makes the employee unable to perform the functions of his/her position, except for leave taken for disability on account of pregnancy, childbirth or related medical condition.[4]

Leave taken in accordance with CFRA runs concurrently with, *not in addition to,* any leave period to which the employee would be entitled under FMLA, except for leave taken because of disability on account of pregnancy, childbirth, or related medical conditions. (See further discussion below and Chapter entitled "Pregnancy, Childbirth and Related Medical Conditions.)

C. Jurisdiction

See Chapter entitled "Jurisdiction."

D. Elements of the Prima Facie Case of Discrimination

1. Denial of CFRA Leave

An unlawful denial of CFRA leave is demonstrated if it is shown by a preponderance of the evidence that:

a. The employer was a covered employer;

b. The employee who requested CFRA leave was an eligible employee;

c. The request for leave was for a CFRA-qualifying purpose;

d. The request for leave was reasonable, i.e., in compliance with any application notice requirements and accompanied, as required, by certification of the employee's need for leave;

e. The employer denied the eligible employee's request for CFRA leave.[5]

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[4] Gov. Code, § 12945.2, subd. (c)(3)(A)-(C).
[5] Cal. Code Regs., tit. 2, § 7297.1, subd. (b)(1).

2. Failure to Reinstate to the Same or Comparable Position Following CFRA Leave

An unlawful failure to reinstate an employee who takes CFRA leave to the same or a comparable position following the conclusion of the leave period is demonstrated if a preponderance of the evidence establishes that:

a. The employer was a covered employer;

b. The employee who took leave was an eligible employee;

c. The employee requested and the employer granted the leave for a CFRA-qualifying purpose;

d. At the conclusion of the leave, the employer failed to return the employee to the same position he/she held before commencing leave or to a comparable position (virtually identical) position; and

e. No affirmative defense excuses the employer's failure to reinstate the complainant to his/her same position or a comparable position at the conclusion of CFRA-qualifying leave.

3. Retaliation for Exercising Right to CFRA Leave

Unlawful retaliation against an individual who exercises his/her right to CFRA leave and/or gives information or testimony in an inquiry or proceeding regarding his/her own or another person's CFRA leave is demonstrated by a preponderance of evidence showing that:

a. The employer was a covered employer;

b. The complainant was an eligible employee;

c. The complainant exercised his/her right to take leave for a qualifying purpose; and

d. The complainant was subjected to an adverse employment action, such as termination of employment, fine or suspension because of his/her exercise of his/her right to CFRA leave.[6]

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[6] *Dudley v. Department of Transp.* (2001) 90 Cal.App.4th 255. Presumably, the prima facie elements of a case of retaliation based upon the complainant's provision of information or testimony in an inquiry or proceeding are the same, but there is no case on point which specifically sets forth those prima facie elements.

E. Eligibility Requirements

1. Eligible Employees

An employee is "eligible" for CFRA-qualifying leave if he/she meets the following requirements:

a. The employee must be a full- or part-time employee working in California who has more than 12 months (52 weeks) of service with the employer at any time;

b. The employee must have actually worked[7] for the employer at least 1,250 hours during the 12-month period immediately prior to the date the leave is to begin;[8]

Once an employee meets the two eligibility requirements noted above and takes a leave for a qualifying event, he/she does not have to re-qualify (regarding the number of hours worked) in order to take additional leave for the same qualifying event during the employer's 12-month leave period;[9] and

c. The employee must work for a "covered" employer, i.e., a person or individual engaged in business or enterprise in California who directly employs 50 or more persons either part- or full-time within 75 miles of the worksite[10] where the employee requesting leave is employed.[11] Religious non-profit entities are *not* exempt.[12] The State and its political subdivisions, regardless of the number of employees, are also "covered" employers.

1) "Directly employs" means that the employer maintains an aggregate of at least 50 part- or full-time employees on its payrolls for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year. The workweeks do not have to be consecutive. "Current or preceding calendar year" refers to the calendar year in which the employee requests the leave or the calendar year preceding the request.[13]

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[7] "Worked" within the meaning of the Fair Labor Standards Act, 29 C.F.R. Pt. 785.
[8] Gov. Code, § 12945.2, subd. (a), (b); Cal. Code Regs., tit. 2, § 7297.0, subd. (e)(1).
[9] Cal. Code Regs., tit. 2, § 7297.0, subd. (e)(1).
[10] The distance is measured in surface miles using surface transportation. (Cal. Code Regs., tit. 2, § 7297.0, subd. (e)(3).)
[11] Gov. Code, § 12945.2, subd. (a), (b); Cal. Code Regs., tit. 2, § 7297.0, subd. (e)(3).
[12] Religious non-profit entities are exempt from the FEHA *except* as to CFRA. Therefore, it is possible that a religious non-profit entity may be required to comply with CFRA, but not the FEHA's pregnancy or disability provisions.
[13] Cal. Code Regs., tit. 2, § 7297.0, subd. (d)(1).

2) It is not necessary that the employer have 50 employees *within the State of California*. The employer must be doing business within the State and the employee seeking leave must be employed in California, but as stated above, the employer must have at least 50 employees within 75 miles of the requesting employee's worksite.

Independent contractors are not included in the definition of the phrase "[p]erform services for a wage or salary."[14]

2. Computation of the 12-Month Period

Employees of temporary employment agencies/services who are assigned by that agency to work for a specific contracting employer may be deemed to have begun work, for the purpose of establishing eligibility for CFRA leave, as of the date they were hired by the agency.

There may be circumstances under which an employee is deemed to have "joint employers" such as when the employee performs work which simultaneously benefits two or more employers or the employee works for two or more employers at different times during the workweek. Joint employment is ordinarily found to exist when a temporary or leasing agency supplies employees to a second employer. Examples of when a joint employment relationship will be deemed to exist include:

a. Where there is an arrangement between employers to share an employee's services or to interchange employees;

b. Where one employer acts directly or indirectly in the interest of the other employer regarding the employee;

c. Where the employers are not completely disassociated regarding the employee's employment and may be deemed to share control of the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with the other employer.[15]

Example: A temporary employment agency assigned the employee to work for a contracting employer. The assignment was for full-time work on a temporary basis. After nearly seven months, the employee accepted a permanent position with the contracting employer and terminated her relationship with the temporary agency. Thereafter, the employee sought to take a protected leave for her own serious health condition. The employer contended that she was not eligible because

[14] Cal. Code Regs., tit. 2, § 7297.0, subd. (d)(2).
[15] 29 C.F.R. § 825.106.

she had not been employed for the requisite 12 months. To reach that conclusion, the employer disregarded the period of time during which the employee was assigned to work on its premises by the temporary agency, arguing that her employment actually began on the date she became a full-time permanent employee of the employer, not when she began work via the temporary agency.

The court held that the employee was eligible for a protected leave since FMLA defines "employ" as "to suffer or permit" to work.[16] *The employee reported to and was permitted to work at the employer's facility for a 12-month period which was not altered by her classification as "temporary" or "permanent." Additionally, the temporary agency and employer would be considered joint employers of the employee.*[17]

3. Calculation of the Number of Hours Worked

To determine whether or not an employee has worked the requisite 1,250 hours in order to qualify for CFRA leave, the employer may select a calculation method from among a variety so long as the determination is not limited by recordkeeping techniques or compensation agreements that do not accurately reflect *all* of the hours actually worked by the employee. If an employer fails to maintain accurate records of the number of hours worked by an employee, including executive, administrative and professional employees for whom such record-keeping is not normally required under applicable law, it is the employer's burden to prove that the employee has not worked the minimum required number of hours. A failure to make such showing by the employer results in the employee being deemed to have worked the needed number of hours.[18]

The issue of whether or not an employee's time was actually spent working is resolved by determining if the "time is spent predominantly for the employer's benefit or the employee's."[19]

Example: An airline flight attendant contended that she was wrongfully suspended, terminated from her employment, and denied her right to protected leave. The employer argued that she had never amassed a more than 1,000 hours worked in any given year and was not, therefore, an eligible employee. The employee contended that time spent greeting, welcoming, and deplaning passengers, participating in post-flight

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[16] The definitions of "employ" and "employee" come from the Fair Labor Standards Act (FLSA). (29 U.S.C. §§ 203(c)-(d), 2611(3).)

[17] *Miller v. Defiance Metal Products, Inc.* (1997) 989 F.Supp. 945.

[18] 29 C.F.R. § 825.110(c).

[19] *Rich v. Delta Air Lines, Inc.* (1996) 921 F. Supp. 767, citing *Skidmore v. Swift & Co.* (1944) 323 U.S. 134, 137; *Armour & Co. v. Wantock* (1944) 323 U.S. 126,133.

debriefings, and layovers should all be counted as hours worked for the purpose of determining her eligibility.

Giving the employee the benefit of the doubt as to the time spent greeting, deplaning and debriefing, her total number of hours worked still fell far below the requisite 1,250. With regard to layovers, the court analyzed the extent to which the employee was completely relieved from duty and able to use the time effectively for her own purposes, noting that such time will only count as hours worked if the employee's free time is severely restricted. The employee admitted that layover time could be used for her own purposes, e.g., to go to concerts, dinner, the library, shopping. The only restrictions on layover time were minimal: Employees could not consume alcohol or drugs and were required to leave a telephone number where they could be reached if leaving their hotel for more than six hours. Between flights, attendants were not required to remain on call, carry a beeper or wait at their hotel in case of reassignment or rescheduling. In fact, employees were not disciplined if the airline was unable to contact them in such an event, as reroutes rarely occurred after the crew was released from duty and arrived at the hotel. Thus, the court refused to include layover time in the computation of hours worked for the purpose of determining eligibility.[20]

4. Covered Employers

For the purpose of determining if an employer is "covered," an "integrated employer" test may be utilized to evaluate whether or not separate entities should, under the law, be viewed as one employer employing 50 or more employees. The criteria evaluated include, but are not limited to:

a. Common management;
b. Interrelation between operations;
c. Centralized control of labor relations (the most critical factor); and
d. Degree of common ownership/financial control.[21]

Example: An automotive inspector for an automobile service station was not reinstated to his employment following a six-week leave to undergo surgery. He claimed that he was replaced by another employee and told, when he was ready to resume his duties, "There's no work for you." The employee claimed that he was an eligible employee because, even though the service station employed less than 50 employees, it was an integrated employer. The service station was owned by a corporation, 100% of the shares of which were owned by one individual. That same individual owned 50% of the shares in seven other corporations and

[20] *Ibid*.
[21] 29 C.F.R. § 825.104(c)(1)-(2).

served as president and chief executive officer of every corporation, in addition to establishing wage and benefit guidelines. The corporations also had a commonality of officers and directors, made bulk purchases of equipment together, ran common advertising, and sometimes transferred employees from one corporation to another. The corporations also shared a common letterhead.

The court employed the "integrated employer" test described above to conclude that the employer was not covered and the employee was not eligible for protected leave. Among the factors considered by the court were:

a. The corporations did not have common day-to-day management;

b. There was some interrelationship of operations, as evidenced by the transfer of employees and joint bulk purchases, but each corporation filed separate tax returns, held separate Board of Directors' and shareholder meetings, conducted separate banking operations, purchased and sold goods separately, entered into separate lease agreements, had separate day-to-day management, did not share office space, and none were undercapitalized;

c. The fact that administrative services were purchased for seven of the corporations by an eighth was not persuasive given the financial savings achieved by such an arrangement; and

d. There was little evidence that labor operations were centralized since each separate company hired, fired and supervised its own employees, and established their work schedules.

Observing that the "integrated employer" test directs a court to decide "what entity made the final decisions regarding employment matters related to the person claiming discrimination," the court concluded that only the service station which employed the employee made the decision not to reinstate him to his employment. Thus, the service station was not a covered employer and the employee was not eligible for protected leave.[22]

F. Key Definitions

Specific meanings are assigned to key terms used in both CFRA and FEHC's Regulations.

[22] *Hukill v. Auto Care, Inc*. (4th Cir. 1999) 192 F.3d 437.

1. Definition of "Child"

"Child" means:

a. Biological, adopted or foster son or daughter

b. Stepson or stepdaughter

c. Legal ward

d. Child of an employee who stands in loco parentis to that child, who is either under 18 years of age or an adult dependent child.[23] An "adult dependent child" is one who is 18 years of age or older and "incapable of self-care because of a mental or physical disability" as those terms are defined in the FEHA.

Example: The complainant was an eligible employee employed by a covered employer. She applied for intermittent leave – every Friday off work for 12 weeks in order to drive her adult daughter to the hospital for chemotherapy treatments.

The employer initially approved her request, but then notified her that the approval was rescinded, instead offering her an unpaid leave of absence from all of her duties. When she stated that she could not afford to take a lengthy, unpaid leave, the employer terminated her employment.

The complainant alleged that she was denied the right to take CFRA leave for which she was qualified and to which she was entitled because her adult daughter was not "incapable of self-care." Did the employer violate CFRA? Perhaps. If the daughter's health care provider certified that her serious health condition "warrant[ed] the participation of the employee," the employer should have granted the complainant's request for leave.[24]

"In loco parentis" means in the place of a parent; instead of a parent; charged with a parent's rights, duties, and responsibilities. A biological or legal relationship is not necessary in order for a person to stand/have stood in loco parentis.[25]

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[23] Cal. Code Regs., tit. 2, § 7297.0, subd. (c)(1).

[24] See *Headlee v. Vindra Inc.* (2005) 2005 WL 946981. [Note: The case is an unpublished decision which may not be cited as persuasive authority before any administrative tribunal or court.]

[25] Cal. Code Regs., tit. 2, § 7297.0, subd. (c)(1).

Example: A same-sex couple decides to have a child. Both women are employed, but not by the same employer. Both are eligible for CFRA-qualifying leave. They decide that one of them will carry and deliver the child which will be conceived using donor sperm. The birth mother will utilize her CFRA-entitled leave to remain at home with the newborn. At the conclusion of her leave, her partner requests CFRA-qualifying leave in order to maximize the period of time that the newborn is cared for by one of the parents before being placed in daycare.

The partner's employer denies her request for CFRA leave for the purpose of birth and bonding on the ground that the employee is not the newborn's "parent," as that term is defined below. The employer correctly points out that the partner is not the child's biological, foster, adoptive or stepparent, nor has she been granted legal guardianship of the infant. However, the employee contends that she stands "in loco parentis" because the identity of the biological father is unknown and that individual has no relationship with the child. Therefore, she argues, she occupies the role of parent in the child's life. Has the employer violated CFRA by denying leave to the partner?

There is no case on point as of this writing. Would the analysis be impacted if the partner had commenced adoption proceedings, seeking to become the child's adoptive parent, but the adoption was not yet finalized at the time that she requested leave? Perhaps, since Government Code section 12993, subdivision (a), directs that the FEHA be "construed liberally for the accomplishment of" its purposes, i.e., the prevention and eradication of discrimination, harassment, and retaliation.[26]

The definition of "child" does not include a grandchild. However, a grandparent might be eligible to take a CFRA-qualifying leave to care for a grandchild if the grandparent is acting as the child's parent or standing in loco parentis. If the grandparent is simply helping or assisting the parent(s) with the care of the child, the grandparent would not qualify for a protected CFRA leave.[27]

An "adult dependent child" is:

a. An individual who is 18 years of age or older; and

b. Incapable of self-care because of a mental or physical disability as defined in the FEHA.[28]

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[26] DFEH staff should direct inquiries to a DFEH Legal Division Staff Counsel.
[27] Gov. Code, § 12945.2, subd. (c)(1)(A)-(B); Cal. Code Regs., tit. 2, § 7297.0, subd. (c)(1).
[28] Gov. Code, § 12926, subds. (i) and (k).

2. Definition of "Parent"[29]

"Parent" means a biological, foster, or adoptive parent, a stepparent, a legal guardian, or other person who stands/stood in loco parentis to the employee when the employee was a child. "Parent" does *not* include a "parent-in-law."[30]

As discussed above, "in loco parentis" means in the place of a parent; instead of a parent; charged with a parent's rights, duties, and responsibilities. A biological or legal relationship is not necessary in order for a person to stand/have stood in loco parentis.[31]

3. Definition of "Spouse"

"Spouse" means a partner in marriage as defined in Family Code section 300.[32] Domestic partners (in accordance with Family Code Section 297)[33] *are* included in the definition of family members.[34]

4. Definition of "Serious Health Condition"

A "serious health condition" is defined as an illness, injury, impairment, or physical or mental condition that involves one of the following:

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[29] Gov. Code, § 12945.2, subd. (c)(7).
[30] Cal. Code Regs., tit. 2, § 7297.0, subd. (l).
[31] Cal. Code Regs., tit. 2, § 7297.0, subd. (c)(1).
[32] "Marriage is a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary. Consent alone does not constitute marriage. Consent must be followed by the issuance of a license and solemnization as authorized by this division . . . " (Fam. Code, § 300.)
[33] Domestic partners are "two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring." To establish the partnership, both persons must file a Declaration of Domestic Partnership with the Secretary of State. They must also have a common residence, not be married to someone else or a member of another domestic partnership, not be related by blood in a way that would prevent them from being married to each other in California, be at least 18 years of age, be capable of consenting to the partnership, and either be members of the same sex or meet the eligibility criteria under Title II of the Social Security Act for old-age insurance benefits or Title XVI of the Social Security Act for aged individuals. Persons of opposite sexes may not constitute a domestic partnership unless one or both of the persons are over the age of 62. (Fam. Code, § 297.) Domestic partners "have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses." (Fam. Code, § 297.5.)
[34] Gov. Code, § 12945.2(c)(1)(A)-(B); (7); Cal. Code Regs., tit. 2, § 7297.0, subds. (l), (p).

a. Inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential care facility, including any period of incapacity (i.e., inability to work, attend school, or perform other regular activities due to the serious health condition) or any subsequent treatment in connection with such inpatient care;

b. Continuing treatment by a health care provider which includes one or more of the following:

A period of incapacity (i.e., inability to work, attend school, or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom) for more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition that also involves:

1) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or

2) Treatment by a heath care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

c. A period of incapacity or treatment for such incapacity due to a chronic serious health condition which:

1) Requires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider;

2) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

3) May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).

d. A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider, for example, Alzheimer's, a severe stroke or the terminal stages of a disease.

e. Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider

of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), or kidney disease (dialysis).[35]

Note: A disability due to pregnancy, childbirth or related medical condition(s) is not a "serious health condition" under CFRA.

Leave may be taken for "treatment" for substance abuse. It is not necessary that the employee be admitted to a hospital or clinic in order to qualify, thus, an employee attending outpatient treatment sessions would qualify for protected leave. However, it is important to note that CFRA leave is available for absences occurring because an employee is undergoing treatment for substance abuse *as opposed to* absences from work which occur because of the employee's use of the substance in question.[36]

5. Definition of "Health Care Provider"

a. A doctor of medicine or osteopathy authorized to practice medicine or surgery by the state in which the doctor practices;

b. Any other person determined by the United States Secretary of Labor to be capable of providing heath care services;

c. Podiatrists, dentists, clinical psychologists, optometrists, chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist);

d. Nurse practitioners, nurse mid-wives, and/or clinical social workers who are authorized to practice under State law and who are performing within the scope of their practice as defined under State law;

e. Christian Science practitioners listed with the First Church of Christ Scientist in Boston, Massachusetts;

f. Any health care provider from whom the employer's group health plan benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits;

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[35] Gov. Code, § 12945.2, subd. (c)(8); Cal. Code Regs., tit. 2, § 7297.0, subds. (o)(1)-(2); 29 C.F.R. § 825.114(a).
[36] 29 C.F.R. § 825.114(d).

g. A health care provider listed above who practices in another country, who is authorized to practice in accordance with the law of that country, and who is performing within the scope of his/her practice as defined under such law.[37]

G. Computation of the Leave Period

A covered employer is required to grant an eligible employee a maximum leave of 12 workweeks in a 12-month period.[38]

"12 workweeks" means the *equivalent* of 12 of the employee's normally scheduled workweeks. For eligible employees who work more or less than five days per week, or pursuant to an alternative work schedule, the number of working days that constitute 12 workweeks is calculated on a pro rata or proportional basis.[39]

Example: An eligible employee works full-time or 40 hours per week. He/she is entitled to a maximum of 12, 40-hour workweeks of leave, or a total of 480 hours. Stated differently, he/she works five eight-hour days per week. Therefore, his/her leave entitlement is 60 working and/or paid eight-hour days.[40]

Example: An eligible employee who regularly works 30 hours per week is entitled to a leave that is the equivalent of 12, 30 hour workweeks, or a total of 360 hours.[41]

1. Computation Method

The employer is free to choose the method by which it will determine the "12-month period" in which the employee's leave entitlement accrues, but it must apply the chosen method consistently and uniformly to all employees. In other words, it cannot utilize one method for one employee or class of employees while employing another method for a different employee or class of employees.[42]

The methods from which the employer may pick are:

a. The calendar year.

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[37] Gov. Code, § 12945.2, subd. (c)(6)(A)-(B); Cal. Code Regs., tit. 2, § 7297.0, subds. (j)(1)-(2); 29 C.F.R. § 825.118.

[38] Gov. Code, § 12945.2, subd. (a); Cal. Code Regs., tit. 2, § 7297.3, subd. (a). A covered employer *may*, of course, adopt a more generous leave policy.

[39] Cal. Code Regs., tit. 2, § 7297.3, subd. (c).

[40] Cal. Code Regs., tit. 2, § 7297.3, subd. (c)(1).

[41] Cal. Code Regs., tit. 2, § 7297.3, subd. (c)(1).

[42] Cal. Code Regs., tit. 2, § 7297.3, subd. (b).

Example: The employer selects the calendar year method by which to compute employee leave entitlement. Each new calendar year begins a new 12-month period in which employees are eligible to take up to 12 workweeks of CFRA leave, provided that they meet the other requirements. Thus, an eligible employee may take a leave of up to 12 workweeks during the period of January 1 through December 31.[43]

b. Any fixed 12-month "leave year," e.g., a fiscal year, a year required by State law, or a year starting on an employee's "anniversary"[44] date.

c. The 12-month period measured forward from the date an employee's first CFRA leave begins.

d. A "rolling" 12-month period measured backward from the date an employee uses CFRA leave.[45]

2. Continuous vs. Intermittent Leave

Leave may be taken all at once, i.e., in one continuous period of time. Or it may be taken on an intermittent or reduced work schedule. In that event, only the amount of leave actually taken by the employee may be counted toward the 12 weeks of leave to which he/she is entitled.[46]

Example: An employee suffers an injury for which he/she requires physical therapy. He/she must be absent from work two hours per week. Only those two hours can be charged by the employer against the employee's leave entitlement. If he/she is a full-time employee working 40 hours per week and the employer utilizes the calendar year method to calculate employee leave entitlement, the employee would be entitled to take two hours per week leave for the entire year and still not exhaust his/her entitlement prior to the commencement of the new leave period. This is because, at two hours per week, the employee would not exhaust his/her entitlement over the course of the 52-week year (40 hours/week employment x 12 weeks = 480 hours total entitlement of which he/she would only exhaust 104 hours at 2 hours/week x a maximum of 52 weeks, not considering vacation periods, if any).

Example: An employee worked for a company that maintained an attendance policy under which employees were given "infractions" each

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[43] Cal. Code Regs., tit. 2, § 7297.3, subd. (b).
[44] An employee's "anniversary" date is the day of the year upon which he/she commenced employment or was hired.
[45] 29 C.F.R. § 825.200(b).
[46] Gov. Code, § 12945.2, subd. (p); Cal. Code Regs., tit. 2, § 7297.3, subd. (c)(2).

time they were tardy or had an unauthorized absence. Disciplinary action ranging from a verbal warning to termination was imposed when numerous infractions were accrued within specified time intervals. The employee's son became gravely ill. He notified the employer of his son's condition and his need to take time off work to care for him. The employer was justified in giving the employee infractions for tardies and absences on dates when the employee did not notify the employer that his late arrival or absence was due to his son's serious health condition. Even though the employee was entitled to take leave to care for his son on an intermittent basis, it was his responsibility to advise the employer of the instances when his being tardy or absent from work related to his son's condition.[47]

3. Minimum Duration of Certain Leaves

When an employee requests leave for the birth, adoption, or foster placement of a child, and both parents are employed by the same employer, CFRA leave can be restricted to a total of 12 workweeks in a 12-month period *between* the two employees.[48] Any leave taken must be concluded within one year of the birth or placement of the child.[49] This limitation cannot be placed upon leaves taken for the employee's own serious health condition or to care for a qualifying family member by married couples or domestic partners who are employed by the same employer. Thus, parents who are employed by the same employer would each be entitled to 12 weeks of leave in order to care for their mutual child who has a serious health condition.

The basic minimum length of leave for the birth, adoption, or foster placement of a child is two weeks.[50] The employer shall grant a request for CFRA leave in increments of less than two weeks on two occasions.[51] Unlike leave for the employee's own or a family member's serious health condition, leave for the birth or placement of a child may <u>not</u> be taken in the form of a reduced work schedule.[52]

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[47] *Mora v. Chem-Tronics, Inc.* (1998) 16 F.Supp.2d 1192, 1211. Note that if the employer is unaware that the employee's leave might be protected by CFRA, the employee must notify his/her employer that he/she desires to have the leave so designated within two days of returning to work. (Cal. Code Regs., tit. 2, § 7297.4, subd. (a)(1)(B); 29 C.F.R. § 825.208(e)(1).)

[48] Gov. Code, § 12945.2, subd. (q); Cal. Code Regs., tit. 2, § 7297.1, subd. (c). Note, however, that the employer may not limit the employee's entitlement to CFRA leave for any other qualifying purpose. Note also that the restriction does not apply to spouses who have a child together, but, rather, to "parents."

[49] Cal. Code Regs., tit. 2, § 7297.3, subd. (d).

[50] Cal. Code Regs., tit. 2, § 7297.3, subd. (d).

[51] Cal. Code Regs., tit. 2, § 7297.3, subd. (d).

[52] *Reid v. SmithKline Beecham Corp.* (2005) 366 F.Supp.2d 989, fn. 5 at p. 996, comparing Cal. Code Regs., tit. 2, § 7297.3, subd. (d), with Cal. Code Regs., tit. 2, § 7297.3, subd. (e)(1).

Example: A female account manager with a pharmaceutical company notified her employer that she was pregnant and advised of the approximate dates she would take pregnancy disability leave. She returned from leave following the birth of her child and was informed by her supervisor three days later that she would be required to travel from her home in San Diego to Philadelphia to attend a two-week training session. The employee refused to make the trip, stating "the fact that I have an11-week-old infant presents a number of issues which make it impossible for me to attend this training." The employer offered the employee a number of accommodations in order to make it easier for her to travel to and attend the training, including allowing her to bring her infant and his caregiver with her or providing a replacement caregiver, allowing her to take as many lactation breaks as necessary utilizing the lactation rooms at the training facility, paying for a larger hotel room to accommodate childcare, and providing a refrigerator in which to store milk. Still the employee persisted in her refusal to attend the training. She contended that she was entitled to and requested CFRA leave, and the employer violated CFRA when it terminated her employment on the ground of "job abandonment" after she failed to appear at the training as directed.

The court held that the employer did not violate CFRA because the employee never requested time off work because of her newborn child. She merely asked that she not be required to travel in conjunction with her work. CFRA was not enacted to encompass employee accommodation requests other than time off work. The strict requirements set forth in the FEHC's Regulations related to leaves for the birth or placement of a child discourage an interpretation allowing for employee accommodation requests short of actual time off work in intervals of at least two weeks.[53]

H. Employee Obligations

1. Request For/Notification of Need for CFRA Leave

a. Thirty Days Advance Notice of Need for Leave

An employer may require employees to provide at least 30 days advance notice that CFRA leave will be needed *if* the need for leave is foreseeable based upon an expected birth, placement of a child for adoption or foster care, or planned medical treatment for the employee or family member's serious health condition.[54]

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[53] *Reid v. SmithKline Beecham Corp.* (2005) 366 F.Supp.2d at p. 997.

[54] Gov. Code, § 12945.2, subd. (h); Cal. Code Regs., tit. 2, § 7297.4, subd. (a)(2).

Under such circumstances, the employee shall consult with the employer and make a reasonable effort to schedule planned medical treatment or necessary medical supervision so as to minimize any disruption to the operations of the employer, subject to the approval of the health care provider.[55]

> *Example: A Certified Public Accountant (CPA) plans to undergo gastric bypass surgery which will require him to be off work for a total of eight weeks. Although the employee's physician states that the surgery is medically advisable, it is not necessary that it be performed on a date certain or within a specific period of time since the employee is not suffering from an immediately life-threatening illness or condition. It is the employer's policy that employees provide at least 30 days advance notice of the need for leave when it is foreseeable due to planned medical treatment. The employer also has a policy that requests for vacation and leaves of absence are not granted during the period from March 1 to April 15, commonly known as "tax season." The CPA has an obligation to consult with his employer and plan his upcoming surgery and recuperation so as not to disrupt the operation of the employer's business, i.e., at a time other than "tax season," subject to his health care provider's approval.*

b. At Least Verbal Notice as Soon as Practicable

An employee must provide at least verbal notice sufficient to make his/her employer aware of his/her need for protected leave. "The notice may be given by the employee's spokesperson (e.g., spouse or other adult family member) in the event the employee is unable to give notice."[56] Additionally, the employee should provide the anticipated date upon which the leave will commence and the projected duration (length) of the leave to the extent known at the time of providing notice.

It is not necessary that the employee expressly invoke his/her rights under CFRA (or FMLA) or even *mention* CFRA (or FMLA). However, the employee must provide sufficient verbal or written notice to make his/her employer aware of his/her need for a potentially CFRA-qualifying leave.

The employer should make further inquiries if it is necessary to gather more information about whether the employee is actually requesting

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[55] Gov. Code, § 12945.2, subd. (i); Cal. Code Regs., tit. 2, § 7297.4, subd. (a)(2).
[56] 29 C.F.R. §§ 825.302(c), 825.303(b); Cal. Code Regs., tit.2, § 7297.4, subd. (a)(1)(A).

CFRA leave and ascertain the necessary details pertaining to the leave.[57]

If an employee cannot give 30 days advance notice because of a lack of knowledge as to when leave will be required to begin, a change in circumstances or a medical emergency, notice of the need for leave must be given to the employer as soon as practicable.[58] Whether the notice provided by the employee is sufficient both in terms of its timing and content depends upon the facts and circumstances which are unique to that employee's situation.[59] In other words, it is a question of fact. CFRA does not set forth any particular time limit as to when notice must be provided. Therefore, an employer policy stating that an employee must report his/her absence within a specific period of time prior to the commencement of his/her shift may violate CFRA if an employee's failure to comply with such policy forms the basis of a denial of CFRA-qualifying leave or disciplinary action taken against the employee for violating it. Courts have recognized that the purpose of CFRA is to:

> deal with situations such as . . . a worker having to balance the needs of family and work and needing flexibility to deal with emergency family and medical problems. A company policy that does not allow for such flexibility nor recognize that in [CFRA] leave situations it may not be possible for an employee to call in one-half hour before a shift begins violates the employee's rights under the [CFRA]. Undoubtedly, an employer can establish its own policies for usual and customary notice for requesting general leave. But such policies must defer to the [CFRA] when [CFRA] leave is appropriate.[60]

Thus, an employer shall not deny CFRA leave to an employee, the need for which is due to an emergency or otherwise unforeseeable, on the basis that the employee did not provide advance notice of his/her need for leave.[61]

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[57] Cal. Code Regs., tit. 2, § 7297.4, subd. (a)(1). Some courts have held that an employee's report that he/she will be absent because his/her child is sick is sufficient notice to put the employee on notice of a potentially CFRA-qualifying leave. Moreover, if the employee has made the employer aware of their own or a family member's chronic illness, mention of that illness as the reason for his/her absence might be deemed sufficient.

[58] Cal. Code Regs., tit. 2, § 7297.4, subd. (a)(3).

[59] See *Mora v. Chem-Tronics, Inc.* (1998) 16 F.Supp.2d at p.1209.

[60] *Mora v. Chem-Tronics, Inc.* (1998)16 F.Supp.2d at p. 1217.

[61] Cal. Code Regs., tit. 2, § 7297.4, subd. (a)(4).

Example: The assistant manager of a fabric store was scheduled to report to work at 9:30 a.m. She was in possession of the keys to the doors, security alarm code, passwords needed to activate the cash registers, and combination to the safe from which to remove cash and place it in the cash registers for the purpose of making change for customers. The employee awoke in extreme pain which did not subside despite her self-help measures. Eventually, she asked her husband to take her to the emergency room where she was diagnosed with an inflamed appendix which was on the verge of bursting. As the employee was being wheeled into emergency surgery to remove her appendix, her husband called the store owner to advise that she would not be reporting for work that day due to the circumstances described above. He advised the owner that he did not know how long his wife would remain off work, but as soon as that information became known, either he or his wife would let the store owner know. The husband delivered the keys and other items to the store manager later that day. The store owner terminated the assistant manager's employment on the ground that she failed to provide adequate notice of her need for CFRA leave. The store owner argued that the employee violated the owner's policy of requiring employees to personally notify the owner when they will not be able to report for work, and that she neither provided sufficient detail before beginning her leave (the projected duration of the leave) nor specifically asked for CFRA leave. Therefore, the owner argued that he did not know the assistant manager was asking for protected leave and was justified in terminating her employment on the ground that she was a "no show" on three consecutive days.

Assuming that the store was a covered employer and the employee was otherwise eligible to take CFRA-qualifying leave, the employer violated CFRA. The employer was provided with sufficient notice of the employee's need for CFRA: She was experiencing a medical emergency, the nature of which should have alerted the employer to the fact that she potentially had a serious health condition which entitled her to a protected leave, even though her husband never mentioned CFRA or FMLA when providing notice. The employer was advised of the situation as soon as was practicable under the emergent circumstances. The fact that the employee was unable to make the call herself was of no consequence: Neither the FEHA nor the Regulations allow an employer to require an employee to personally give notice if he/she is incapacitated and unable to do so. The employee's husband assured the owner that he would be informed of the expected duration of the leave. It was unreasonable for the owner to believe that an employee would be able to undergo an emergency appendectomy and not miss at least

three consecutive days of work while recuperating. The employer was obligated to designate the leave as CFRA-qualifying and so notify the employee. The employer violated CFRA.

2. Certification of the Need for Leave

"Certification" is defined as "a written communication from the health care provider of the child, parent, spouse, or employee with a serious health condition to the employer of the employee requesting a family care leave to care for the employee's child, parent or spouse or a medical leave for the employee's own serious health condition."[62]

a. Serious Health Condition of a Child, Parent or Spouse

An employee has no obligation to provide certification of his/her need for leave to care for a child, parent or spouse with a serious health condition absent a request from the employer for such certification.

However, the employer may require, as a condition of granting leave for the serious health condition of an employee's child, parent or spouse, certification of the serious health condition.[63] An oral request from the employer that the employee furnish medical certification is sufficient,[64] but, in most cases, the request should be made within two business days of the employee's request for leave. In the case of unforeseen leave, the request should be made within two business days after the leave commences.[65] The employer may also require that the certification be provided within 15 calendar days of the employer's request for such certification, unless it is impracticable for the employee to comply within that time frame despite the employee's good faith efforts.[66]

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[62] Cal. Code Regs., tit. 2, § 7297.0, subd. (a); 29 C.F.R. § 825.305(a). Note that the certification must be provided by "the health care provider" of the employee or family member. The law does not require that the certification come from the employee or family member's *primary* care physician. The need for leave may be certified by any of the patient's health care providers so long as that individual has direct knowledge about the serious health condition in question and meets the definition of "health care provider" set forth above. If an employer demands that the primary or a specific health care provider certify the need for leave, it may be found to have interfered with the employee's exercise of his/her CFRA rights if the employee erroneously relies upon the employer's representation(s) to his/her detriment. (See *Schober v. SMC Pneumatics, Inc.* (2000) 2000 WL 1911684. [Note: The case is an unpublished decision which may not be cited as persuasive authority before any administrative tribunal or court.])

[63] 29 C.F.R. § 825.305(a); Gov. Code, § 12945.2, subd. (j)(1); Cal. Code Regs., tit. 2, § 7297.4 subd. (b)(1).

[64] 29 C.F.R. § 825.301(a).

[65] 29 C.F.R. § 825.301(c).

[66] Cal. Code Regs., tit. 2, § 7297.4, subd. (b)(3).

The certification need not[67] identify the serious health condition involved,[68] but shall contain:

1) The date, if known, on which the serious health condition commenced;

2) The probable duration of the condition;

3) An estimate of the amount of time which the health care provider believes the employee needs to care for the child, parent or spouse; and

4) A statement that the serious health condition warrants the participation of the employee to provide care during a period of treatment or supervision of the child, parent or spouse.[69]

The law provides that the right to take leave belongs equally to men and women and, in the case of parent(s) caring for a child with a serious health condition, "recognizes and validates the importance of both fathers and mothers to the lives of children."[70]

"Warrants the participation of the employee" includes, but is not limited to:[71]

1) Providing psychological comfort
2) Arranging "third party" care
3) Directly providing medical care
4) Participating in medical care

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[67] Confidential information pertaining to a child, parent or spouse of an employee requesting leave is protected by the right of privacy set forth in both the State and federal Constitutions and should not be revealed by the health care provider without the patient's authorization.

[68] Cal. Code Regs., tit. 2, § 7297.0, subd. (a)(1); 29 C.F.R. § 825.307(a).

[69] Gov. Code, § 12945.2, subd. (j)(1)(A)-(D); Cal. Code Regs., tit. 2, § 7297.0, subd. (a)(1)(A)-(D).

[70] *Mora v. Chem-Tronics, Inc.* (1998) 16 F.Supp.2d 1192, citing 29 C.F.R. § 825.112(b).

[71] Cal. Code Regs., tit. 2, § 7297.0, subd. (a)(1)(D)(1). FMLA also provides that caring for a sick family member includes both physical and psychological care. (29 C.F.R. § 825.116.) It "includes situations where the employee may be needed to fill in for others who are caring for the family member, or if the employee is needed intermittently, such as when care responsibilities are shared with another member of the family or a third party. [29 C.F.R. § 825.116(a).] If an employer wants verification that the employee is needed to care for another individual, [FMLA] dictates that the employer is to look to the health care provider as the source of such information, and formally request certification. [29 U.S.C. § 2612.]"

There is no requirement that the employee requesting leave demonstrate that no other caretakers are available and, therefore, he/she is the only one able to care for the family member.

Example: A physical therapist was terminated from her position on the ground of job abandonment after she took time off to help her mother move from a two-story home to an apartment. The employee claimed that the employer violated CFRA because it fired her for exercising her right to take leave. The facts showed that the employee's mother did have numerous physical ailments which caused her to be periodically incapacitated, and she was under the continuing supervision of a health care provider. However, she was not suffering from any debilitating condition at the time the employee left her employment to provide assistance with sorting and packing her belongings, and getting her moved into her new home. The evidence also showed that there was no necessity for the mother to move on the dates she selected – she could have waited until another time, but those dates were "just her choice."

The court concluded that the employee did not qualify for CFRA leave. There was no evidence that the assistance she provided her mother was "warranted" during a period of treatment or supervision. None of her ailments had flared up during the relevant time frame, nor was she incapacitated or hospitalized. The employee's own testimony demonstrated that she was not present to directly or indirectly provide or participate in her mother's medical care. She was merely packing and directing the movers. "While [her] presence may have provided her mother some degree of psychological comfort, this was merely a collateral benefit of activities not encompassed by the Commission's regulations."

The result would have been the same under the federal FMLA regulations, even though they specifically endorse family leave when the parent is unable to care for his/her own basic medical, hygienic or other related needs or there is a change in the parent's care, such as when a parent is transferred to a nursing home. In this instance, the employee's mother was not entering a nursing home; she was merely changing private residences.[72]

Example: A sergeant with the Department of Corrections submitted a request for vacation leave from December 21 through 27, stating that he needed "to travel to Michigan to spend the Christmas holiday with my family." He further explained that he had not spent the Christmas holiday with his parents in more than 20 years and

[72] *Pang v. Beverly Hosp., Inc.* (2000) 79 Cal.App.4th 986, citing 29 C.F.R. § 825.116(a)-(b).

"[d]uring the past year, the health of both of my parents has deteriorated significantly and I anticipate each may pass away in the near future." His employer informed him that there was no additional slot remaining open for the week he requested. The employee claimed that the employer violated CFRA when it denied his request and retaliated against him when he filed a grievance with his union.

The court held that the employee failed to demonstrate to his employer, when submitting his request for time off work, that it was founded upon the employee's need to care for a parent who had a serious health condition. Rather, he merely asked for a vacation to spend Christmas with his parents. Even though his memorandum mentioned his parents' failing health, it did not serve to alert his employer of his intent to care for, as opposed to visit, them, as is required by CFRA. Likewise, the employee's own testimony proved that the leave he sought was not CFRA-qualifying. He stated that he was "just attempting to spend Christmas with his ailing family."[73]

b. Employee's Own Serious Health Condition

An employee has no obligation to provide certification of his/her need for leave due to his/her own serious health condition absent a request from the employer for such certification.

However, the employer may require, as a condition of granting leave for the employee's own serious health condition, certification of that serious health condition.[74] An oral request from the employer that the employee furnish medical certification is sufficient,[75] but, in most cases, the request should be made within two business days of the employee's request for leave. In the case of unforeseen leave, the request should be made within two business days after the leave commences.[76]

The employer may require that the certification be provided within 15 calendar days of the employer's request for such certification, unless it is impracticable for the employee to comply within that time frame despite the employee's good faith efforts.[77] The employer must advise the employee, when he/she requests leave, of the consequences for failing to provide adequate certification of the need for leave. The employer must also advise the employee if the certification submitted is incomplete

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[73] *Stevens v. California Dept. of Corrections* (2003) 107 Cal.App.4th 285.
[74] Gov. Code, § 12945.2, subd. (k)(1); Cal. Code Regs., tit. 2, § 7297.4, subd. (b)(2).
[75] 29 C.F.R. § 825.301(a).
[76] 29 C.F.R. § 825.301(c).
[77] Cal. Code Regs., tit. 2, § 7297.4, subd. (b)(3).

and give the employee a reasonable opportunity to cure the deficiency.[78] The employer may not request additional information from the employee's health care provider, but the health care provider may contact the employer, with the employee's permission, in order to clarify the need for leave.[79]

If the need for leave is foreseeable, the employer may delay the start of the employee's leave pending receipt of the medical certification.[80] In the event that the need for leave was not foreseeable, the employer may require the employee to submit the documentation within a reasonable time "under the pertinent circumstances" and, if he/she fails to do so, may delay the continuation of the protected leave. If the employee fails altogether to produce the certification, the employer may deny the leave and notify the employee that any leave taken is not subject to the protections of CFRA.[81]

The certification need not, but may, at the employee's option, identify the serious health condition involved, but shall contain:

1) The date, if known, on which the serious health condition commenced,
2) The probable duration of the condition, and
3) A statement that, due to the serious health condition, the employee is unable to work at all or is unable to perform any one or more of the essential functions of his/her position.[82]

   Example: An employee was denied CFRA leave on the ground that she was performing the same essential job functions for another entity during the same time period for which she requested protected leave.

   When her employer changed her shift, she became upset and sought medical treatment. On July 25, a family nurse practitioner provided her with a note stating: "Plan return to work 8/27/99. Medical reasons." The employer requested a second opinion. The second health care provider opined that she was fit to return to work with no restrictions and her employer directed her to report on August 23. When she failed to comply, her employment was terminated.

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[78] 29 C.F.R. § 825.305(d).
[79] 29 C.F.R. § 825.307(a).
[80] 29 C.F.R. § 825.311(a).
[81] 29 C.F.R. § 825.311(c).
[82] Gov. Code, § 12945.2, subd. (k)(1)(A)-(C); Cal. Code Regs., tit. 2, § 7297.0, subd. (a)(2)(A)-(C).

The employee argued that the legal standard for determining whether or not the employee needed CFRA leave due to inability to perform the essential functions of her position must be "employer-specific." The employer maintained that the employee was not unable to perform the essential functions of her position because she successfully performed the very same functions for another employer during the very same time period for which she claimed entitlement to medical leave.

The court noted that an employer must have "wide latitude" in managing its workforce and operations, and "cannot be bound by employee claims of selective disability." The employee admitted that she could have returned to work had her employer changed her working conditions to suit her and she performed the essential functions of the same job for another entity during the time that she demanded leave from her employer. Thus, the court concluded that she was able, but unwilling, to perform the essential functions of the position she held with her employer and was, therefore, not entitled to CFRA leave.[83]

3. Release from Health Care Provider to Return to Work

As a condition of the employee's return from leave, the employer may require that the employee obtain and submit a "return-to-work" release from his/her health care provider. The release must state that the employee is able to resume work.[84]

This obligation may only be imposed upon a particular employee if the employer has a uniformly applied practice or policy of requiring such a release from other employees as a condition of returning to work following illness, injury or disability.[85]

The FEHA does not supersede a valid collective bargaining agreement provision governing the employee's return to work.[86]

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[83] *Lonicki v. Sutter Health Central* (2005) 124 Cal.App.4th 1139, review granted, 108 P.3d 862.
[84] Gov. Code, § 12945.2, subd. (k)(4); Cal. Code Regs., tit. 2, § 7297.4, subds. (b)(3); 29 C.F.R. § 825.311(c).
[85] Gov. Code, § 12945.2, subd. (k)(4); Cal. Code Regs., tit. 2, § 7297.4, subds. (b)(3); 29 C.F.R. § 825.311(c).
[86] Gov. Code, § 12945.2, subd. (k)(4); Cal. Code Regs., tit. 2, § 7297.4, subds. (b)(3); 29 C.F.R. § 825.311(c).

I. Employer Obligations under CFRA

1. Notice Requirement

Covered employers must provide notice to their employees of their right to request CFRA leave. The notice shall be posted in a conspicuous place(s) where employees tend to congregate. If the employer publishes an employee handbook which describes other kinds of personal or disability leaves available to employees, the employer must include in that publication a description of CFRA leave. The employer may include pregnancy disability and CFRA leave requirements in a single notice to its employees.[87] Covered employers are encouraged to provide a copy of the notice to each current and new employee, ensure that copies are otherwise available to each current and new employee, and disseminate the notice by other available means (for instance, via a company intranet site).[88] If the workforce at any facility or establishment is comprised of 10 percent or more persons for whom a language other than English is their primary language, the employer's notice must be translated into the language(s) spoken by the group(s) of employees.[89]

An employer shall give its employees reasonable advance notice of any employee notification requirements it adopts. In other words, if the employer has adopted a policy of requiring 30 days advance notice for all CFRA-qualifying leaves which are foreseeable, it must provide the members of its workforce with reasonable advance notice of that policy before applying and/or enforcing it.[90]

If the employer fails to provide or post such required advance notice, it is precluded from taking any adverse action against an employee, including denying a request for protected leave, who fails to furnish the employer with advance notice of his/her need to take CFRA leave.[91]

2. Timely Response to Leave Request

An employer shall respond to an employee's request for leave as soon as practicable, but in no event later than ten calendar days after receiving the request. The employer shall attempt to respond to the request before the date upon which the leave is due to begin. Once given, the employer's

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[87] Cal. Code Regs., tit. 2, § 7297.9, subd. (a).
[88] Cal. Code Regs., tit. 2, § 7297.9, subd. (b).
[89] Cal. Code Regs., tit. 2, § 7297.9, subd. (c).
[90] Cal. Code Regs., tit. 2, § 7297.4, subd. (a)(5).
[91] Cal. Code Regs., tit. 2, § 7297.4, subd. (a)(5).

approval of the request for leave shall be deemed retroactive to the date of the first day of leave.[92]

3. Certification of Need for CFRA Leave

An employer may not ask an employee to provide additional information beyond that set forth in the FEHC's Regulations.[93]

The employer is responsible for complying with all applicable laws regarding the confidentiality of medical information[94] and must appropriately safeguard and store such information.

a. Serious Health Condition of a Child, Parent or Spouse

If the certification submitted by the employee sets forth the information set forth in the FEHC's Regulations, the employer must accept it as sufficient. However, the employer may require recertification upon expiration of the time period originally estimated by the health care provider if the employee requests additional leave time.[95]

> *Example: The mother of a young child with a severe hearing impairment advised her employer that she needed to take a two-month leave from her duties in order to care for him since the special school he attended was closing for a summer break. Specifically, she stated in her written request that she wanted to work on his speech and language skills by continuing his special training at home, spending time working on basic words and communication skills, and helping him with his other "special needs" so that he would not regress or lose momentum in his therapeutic progress by the time his school reopened in the fall.*
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> *The employer had in place a written family leave policy and certification form, neither of which were provided to the employee, nor was she informed of the medical information she was required to provide her employer in support of her leave request. The child's pediatrician wrote to the employer to explain that the child was "severely hearing impaired with limited speech" and needed to be in an environment where he would be protected, but no such environment existed when his school was not in session. The doctor stated: "I totally support his mother's request for an unpaid family leave of absence." In other words, the doctor opined that the*

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92 Cal. Code Regs., tit. 2, § 7297.4, subd. (a)(6).
93 Cal. Code Regs., tit. 2, § 7297.4, subd. (b)(2)(A)(1).
94 Cal. Code Regs., tit. 2, § 7297.4, subd. (b)(2)(A)(2).
95 Gov. Code, § 12945.2, subd. (j)(2); Cal. Code Regs., tit. 2, § 7297.4, subd. (b)(1).

child's condition warranted his mother's participation during the period of time that his school was closed in order to reinforce the therapy he was receiving. A second letter from the child's audiologist set forth the same facts.

The employer denied the employee's request for leave on the ground that her son's condition did not qualify for FMLA leave, resulting in the employee's resignation when she was forced to choose between her employment and caring for her child.

The FEHC found that the employer failed to provide the employee with notice of her CFRA rights, failed to obtain further information regarding the reasons supporting her request for leave in order to fully evaluate it, and failed to respond to her request within 10 days as is required under California law.[96] *Further, after establishing that the employer was a "covered employer" and the employee was eligible for CFRA leave, the FEHC ruled, based upon the testimony of the child's pediatrician, that the child had a "serious health condition" as defined in CFRA. The employee's letter requesting leave triggered the employer's obligation to inquire further if it needed additional facts in support of her request. However, CFRA contemplates that it is the health care provider who determines whether the family member has a serious health condition, not the employer. The employer cannot substitute its own judgment for that of the health care provider.*

Moreover, the nature of the condition need not even be revealed: "[U]nlike FMLA, CFRA does not give respondent the right to know the nature of [the child's] health condition, much less the kind of care complainant was going to provide for her son." Thus, the employer violated CFRA when it denied the employee's request for leave, thereby forcing her to resign her employment.[97]

b. Employee's Own Serious Health Condition

The employer may require the employee to obtain recertification of his/her need for leave, on a reasonable basis, after the initial leave period has expired.[98]

If the employer has reason to doubt the validity of the certification submitted by the employee, the employer may require, at the employer's own expense, that the employee obtain the opinion of a second health

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[96] Cal. Code Regs., tit. 2, §§ 7297.4, subds. (a)(1), and (a)(6), 7297.9, subd. (a).
[97] *DFEH v. The Standard Register Company* (1999) FEHC Dec. No. 99-04.
[98] Gov. Code, § 12945.2, subd. (k)(2).

care provider, designated or approved by the employer, concerning any information in the certification.[99] The health care provider offering the second opinion may not be employed on a regular basis by the employer.[100] The employer must provide the employee with a copy of the second medical opinion, at no cost, if the employee requests a copy.[101]

If the second opinion obtained differs from the opinion set forth in the original certification, the employer may require, at the employer's expense, that the employee obtain the opinion of a third health care provider. The third health care provider shall be designated or jointly approved by the employer and employee.[102]

The opinion of the third health care provider concerning the information in the certification shall be considered final and binding on both the employer and employee.[103] The employer must provide the employee with a copy of the third medical opinion, at no cost, if the employee requests a copy.[104]

4. Designation of Leave as CFRA-Qualifying

In all circumstances, it is the *employer's* responsibility to designate an employee's leave, whether paid or unpaid, as CFRA or CFRA/FMLA qualifying, based upon the information provided by the employee or the employee's spokesperson. The employer must also provide the employee with notice of the designation.[105]

Example: When an employee sustained injuries in a motor vehicle accident which fell within CFRA's definition of "serious health condition," he advised his employer that he would need leave and was unsure of the date upon which he would be able to return to his duties. The employer had a written policy addressing CFRA which was provided only to management, not its entire workforce. The policy required that employees needing CFRA leave submit medical certification prior to the employer designating it as such. However, that fact was not communicated to the employee, he was never provided a certification form to submit to his health care provider, and the employer's human resources director never inquired of the employee why he had not

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[99] Gov. Code, § 12945.2, subd. (k)(3)(A).
[100] Gov. Code, § 12945.2, subd. (k)(3)(B); Cal. Code Regs., tit. 2, § 7297.4, subd. (b)(2)(A).
[101] Cal. Code Regs., tit. 2, § 7297.4, subd. (b)(2)(D).
[102] Gov. Code, § 12945.2, subd. (k)(3)(C); Cal. Code Regs., tit. 2, § 7297.4, subd. (b)(2)(B).
[103] Gov. Code, § 12945.2, subd. (k)(3)(D); Cal. Code Regs., tit. 2, § 7297.4, subd. (b)(2)(C).
[104] Cal. Code Regs., tit. 2, § 7297.4, subd. (b)(2)(D).
[105] Cal. Code Regs., tit. 2, § 7297.4, subd. (a)(1)(A).

submitted certification in support of his request for leave. The human resources director designated the leave as a "medical leave of absence," but not a CFRA-qualified leave. The employer violated CFRA by failing to appropriately designate the employee's leave, in addition to failing to notify him about his rights under CFRA.[106]

An employer may not designate an employee's leave as "CFRA leave" retroactively after the employee has returned to work, except under the same limited circumstances provided for in FMLA and its implementing regulations under which retroactive designation is allowed:[107]

a. If the employee was absent for a CFRA-qualifying reason and the employer did not learn the reason for the absence until the employee returned to work, the employer may, within two business days of the employee's return to work, designate the leave retroactively with appropriate notice to the employee.

   If the leave was taken for a CFRA-qualifying reason, but the employer was not aware of the reason and the employee desires that the leave be deemed CFRA leave, the employee must notify the employer within two business days of returning to work. A failure to so notify the employer bars the employee from later asserting a violation of CFRA (or FMLA).[108]

b. If the employer knows the reason for the leave but has not been able to confirm that the leave is CFRA-qualifying, the employer has requested medical certification which has not yet been received or the parties are in the process of obtaining a second or third medical opinion, the employer should make a preliminary designation, and so notify the employee at the time leave begins or as soon as the reason for the leave becomes known. Upon receipt of the requisite information from the employee or the medical certification confirming the need for leave, the preliminary designation should become final. Conversely, if the information subsequently received from the employee or the certification fails to substantiate the need for leave, the preliminary designation must be withdrawn and written notice provided to the employee.[109]

If the employer grants the employee's request to take protected leave, but fails to properly designate the leave as CFRA-qualifying and so notify the employee, will the leave actually taken by the employee count toward his/her 12-week annual entitlement? The California courts and FEHC have not

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[106] *DFEH v. Tri-Star Electronics International, Inc.* (2001) FEHC Dec. No. 01-01.
[107] Cal. Code Regs., tit. 2, § 7297.4, subd. (a)(1)(B).
[108] 29 C.F.R. § 825.208(e)(1).
[109] 29 C.F.R. § 825.208(e)(2).

addressed this issue, although the United States Supreme Court considered it in the context of FMLA leave.

> *Example: The complainant, following a diagnosis of Hodgkin's disease, was required to take leave to undergo surgery and radiation therapy. She was eligible to take seven months of unpaid sick leave in accordance with the employer's policy. She remained off work for a total of 30 weeks, during which time the employer held her position open for her and maintained her benefits, including health insurance for which the employer paid the premiums. The employer, however, never advised her that 12 of the 30 weeks would also count as FMLA leave. When, at the conclusion of the seven-month leave period, the complainant was still not able to resume her duties, the employer denied her request to either take additional leave or to return to work on a part-time basis. Her employment was terminated.*
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> *The complainant alleged that, since the employer failed to properly designate the leave as FMLA-qualifying, "the leave taken [did] not count against [her] FMLA entitlement," pursuant to 29 C.F.R. § 825.700(a). Therefore, she argued, despite the fact that she had already taken a seven-month leave, none of that time counted toward her 12-week entitlement to protected leave under FMLA.*
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> *The Court invalidated the regulation in question, finding that the penalty provision set forth therein, i.e., the employer's obligation to provide additional leave as a result of failing to properly designate the leave taken, bears no connection "to any prejudice the employee might have suffered from the employer's lapse." The regulation "amends FMLA's most fundamental substantive guarantee – the employee's entitlement to 'a total of 12 workweeks of leave during any 12-month period," by giving certain employee a right to take more than 12 weeks of protected leave in a given one-year period. Moreover, since the regulation in question applies to employers who already provide their employees with more generous benefits than are required by law, it can have a chilling effect, serving as a disincentive for employers to enact or maintain such policies. Finally, the regulation bears no logical relationship to an employee's actions in reliance upon the employer's representations or having provided/not provided the employee with the requisite notice of his/her right to FMLA leave.*[110]

[110] *Ragsdale v. Wolverine World Wide, Inc.* (2002) 535 U.S. 81. The FEHC's regulations are indistinguishable on this point from the federal regulations. Therefore, DFEH staff should consult with a DFEH Legal Division Staff Counsel in the event that this issue arises during the investigative stage.

The court did not foreclose the possibility that an employee may successfully complain about an employer's failure to properly designate leave on a "case-by-case" basis so long as he/she demonstrates that he/she suffered actual harm as a result of the employer's action. Thus, the analysis must focus upon "what steps the employee would have taken had circumstances been different considering, for example, when the employee would have returned to work after taking leave."[111] Generally, if the employee was unable to return to work at the end of a 12-week leave period, the courts have concluded that he/she was not prejudiced or harmed by the employer's failure to properly designate the leave, i.e., the employer's actions did not impede the employee's return to work.

However, if a complainant is granted a leave of less than 12 weeks, denied other benefits and/or relies, to his/her detriment, upon the employer's representation(s) or actions, the legal result might be different. For instance, if the employer represented to the employee that he/she was entitled to protected leave and he/she took leave when the reality was that he/she was not eligible, the employee might be able to successfully argue that he/she relied, to his/her own detriment, upon the information provided by the employer. Under such facts, the employer might be estopped, i.e., legally prevented, from arguing that it should not provide a remedy to the employee.

J. Terms of CFRA Leave

1. Guarantee of Reinstatement

When granting an employee's request for CFRA leave, the employer shall guarantee that the employee will be reinstated to the same or a comparable position, unless legally excused from doing so. If the employee requests, the guarantee must be provided in writing.[112] Under California law, family care and medical leave shall not be deemed to have been granted unless the employer provides the guarantee.[113]

It is an unlawful employment practice for an employer to refuse to honor a guarantee of reinstatement to the same or a comparable position, unless the employer is legally excused from doing so.[114]

"Employment in the same position" means employment in or reinstatement to the original position which the employee held prior to taking a CFRA-qualifying leave.[115]

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[111] *Farina v. Compuware Corp.* (2003) 256 F.Supp.2d 1033.
[112] Cal. Code Regs., tit. 2, § 7297.2, subd. (a).
[113] Gov. Code, § 12945.2, subd. (a).
[114] Gov. Code, § 12945.2, subd. (a).
[115] Cal. Code Regs., tit. 2, § 7297.0, subd. (f).

"Employment in a comparable position" means employment in a position which is *virtually identical* to the employee's original position in terms of pay, benefits, and working conditions, including the same privileges, perquisites and status. The comparable position must:

a. Have the same or substantially similar duties and responsibilities
b. Require substantially similar skill and effort
c. Provide substantially similar responsibility and authority
d. Be performed at the same or a geographically proximate worksite
e. Have the same shift or the same or an equivalent work schedule

Example: An employee was an on-call worker on the production line of a commercial bakery. Although her duties, starting time and days worked varied, she consistently worked 32 to 40 hours per week, plus frequent overtime. When she underwent emergency gall bladder surgery, she notified her employer, whose human resources assistant noted in her personnel folder that she was taking a medical and personal leave. The employee was not provided with a medical certification form to submit to her health care provider nor was she guaranteed reinstatement to her same or a comparable position either orally or in writing. When she was released to return to work, her supervisor failed to return her telephone calls, so she contacted the human resources assistant directly who advised that business was slow, but she would try to find the employee a position.

The company maintained a policy of replacing any production line employee who was off work for more than a month, including on-call employees. Ten days after the employee first attempted to reach her supervisor by telephone to notify the supervisor of her impending return and one day after the effective date of her medical release, the company assigned another individual to take employee's place on the production line. The employer offered complainant reinstatement to a single two-hour shift, despite the fact that the shortest shift she had ever worked during her term of employment prior to taking leave, even when the employer's business was slow, had been four hours. Further, the human resources assistant represented to the employee that the company might shut down completely and offered to provide the employee with a layoff slip which employee accepted only so that she could collect unemployment insurance until the company recalled her to work. The employee was shocked when she received written documentation indicating that she "had left the job."

The FEHC held that the employer violated CFRA by failing to reinstate the employee to her same position at the conclusion of her CFRA-qualifying leave even though the position was available, but was given to

a different employee. The employer also failed to offer the employee a comparable position. The single two-hour shift she was offered was not virtually identical to the employee's original position.[116]

2. Paid vs. Unpaid Leave

A determination of whether an employee who takes a CFRA-qualifying leave is eligible to continue receiving benefits during the leave period and/or is subjected to disparate treatment by his/her employer is determined by analyzing:

- Whether the leave is for the serious health condition of the employee or another purpose; and

- Whether the leave will be paid or unpaid.

Unpaid CFRA leave for the serious health condition of the employee shall be compared to other unpaid disability leaves whereas unpaid CFRA leaves for all other purposes shall be compared to other unpaid personal leaves offered by the employer.[117]

a. Use of Vacation and Accrued Leave *Other Than* Sick Leave

CFRA leave may be paid or unpaid, depending upon the circumstances.

An employee may elect to use any accrued vacation or other time off (including undifferentiated paid time off (PTO)), *other than accrued sick leave*, that the employee is otherwise eligible to take during the otherwise unpaid portion of CFRA leave.[118]

The employer may require an employee who requests leave for what would be a CFRA-qualifying event to use any accrued vacation time or other paid accrued time off, other than accrued sick leave, that the employee is otherwise eligible to take during the otherwise unpaid portion of CFRA leave.[119]

1) If an employee requests to utilize accrued vacation or other paid accrued time off without reference to a CFRA-qualifying purpose,

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[116] *DFEH v. Sara Lee Corporation* (1998) FEHC Dec. No. 98-16.
[117] Gov. Code, § 12945.2, subd. (e); Cal. Code Regs., tit. 2, § 7297.5, subd. (d)(1).
[118] Gov. Code, § 12945.2, subd. (e); Cal. Code Regs., tit. 2, § 7297.5, subd. (b)(1).
[119] Cal. Code Regs., tit. 2, § 7297.5, subd. (b)(2).

the employer may not ask whether the employee is taking the time off for a CFRA-qualifying purpose.[120]

2) If, after the employer denies the employee's request, the employee provides information that the requested time off is or may be for a CFRA-qualifying purpose, the employer may then inquire further into the reason(s) for the absence.[121]

The employer and employee may negotiate for the employee's use of any additional paid or unpaid time off to substitute for CFRA leave.[122]

b. Use of Sick Leave

An employer may require the employee to use, or the employee may elect to use, any accrued sick leave that the employee is otherwise eligible to take during the otherwise unpaid portion of a CFRA leave for:

1) The employee's own serious health condition; or

2) Any other reason if mutually agreed between the employer and employee.[123]

Example: A firefighter requested and was granted CFRA leave to care for his wife after she suffered an on-the-job injury. The employer's company policy allowed employees to utilize accrued sick leave in order to care for injured or ill family members, so the employee did so. He also served as a volunteer firefighter for the Department of Forestry, but was paid $8 to defray his expenses each time he answered an emergency call.

While on leave caring for his wife, the employee did not respond to calls except on one occasion when he responded to a call reporting a fire two to three miles from his home. In that isolated instance, he enlisted a friend who happened to be visiting to care for his wife while he responded and was away from his home for less than one hour. When he returned to work, he did not report on his time card that he had responded to the call, instead charging the entire time to sick leave credits. The employer terminated his employment on the ground that he committed "time card fraud" by impermissibly "working" as a volunteer firefighter

[120] Cal. Code Regs., tit. 2, § 7297.5, subd. (b)(2)(A).
[121] Cal. Code Regs., tit. 2, § 7297.5, subd. (b)(2)(A)(1).
[122] Cal. Code Regs., tit. 2, § 7297.5, subd. (b)(4).
[123] Gov. Code, § 12945.2, subd. (e); Cal. Code Regs., tit. 2, § 7297.5, subd. (b)(3)(A)-(B).

during the time that he was authorized to be at home caring for his wife.

The court found that the employee was not subjected to discriminatory treatment because the firefighter's employment was not terminated as a result of his exercising his right to take CFRA-qualifying leave. On the contrary, the employer allowed its employees to utilize accrued sick leave to care for family members when it was not required to do so under the law and granted him CFRA leave upon his request. The employer showed no unlawful animus, and offered a factually sound, nonpretextual reason for terminating the firefighter's employment which was unrelated to his exercise of the rights afforded him under CFRA.[124]

c. Temporary Disability Benefits Paid from Other Source(s)

No California court has yet addressed the issue, but employers may be precluded from requiring an employee who receives temporary disability benefits from union plans, State Disability Insurance (SDI), workers' compensation or other sources from requiring employees to utilize accrued paid time off during a CFRA leave that also qualifies as FMLA.

Example: The complainant underwent surgery and was off work for six weeks followed a non-work-related injury. She was a member of a collective bargaining unit that provided its members short term disability benefits. Even though the complainant received short-term disability benefit payments from the union, the employer required her to "substitute any accrued paid leave for any unpaid FMLA leave," insisting that she utilize her accrued vacation time. The complainant alleged that the employer's action violated the federal FMLA regulation which provides that "[b]ecause the leave pursuant to a temporary disability benefit plan is not unpaid, the provision for substitution of paid leave is inapplicable. However, the employer may designate the leave as

[124] *Nelson v. United Technologies* (1999) 74 Cal.App.4th 597. The court found, however, that the employer violated an implied contract that the employee's employment would only be terminated for good cause. The employer did not have good cause in this instance because the employee's act of delegating the care of his wife to his friend for a brief 45 minutes to perform a civic duty about which he was completely candid with his employer did not result in fraud or double compensation. Had he deducted one hour from his usage of sick leave credit for the date in question, he would have been able to use that hour of sick leave on another day. It is permissible, however, for an employer to require an employee, while on CFRA-qualifying leave, to report periodically on his/her status, including whether and when the employee will be able and plans to return to work. (29 C.F.R. §§ 825.309(a), 825.312(e).)

FMLA leave and count the leave as running concurrently for purposes of both the benefit plan and FMLA leave entitlement."

The court held that application of the regulation is neither limited solely to leaves taken because of disability related to childbirth (which is covered under FMLA, but not CFRA) nor application only when the employee receives benefits in accordance with a plan offered/funded by the employer as opposed to a third party such as a collective bargaining unit.

Employers can still require employees to utilize accrued leave entitlements during otherwise unpaid periods of CFRA-qualifying leave such as during any applicable waiting period that precedes benefit payments (seven days under SDI).[125]

d. Health Benefits

If the employer provides health benefits under a "group health plan,"[126] it is obligated to continue providing benefits during an employee's CFRA and/or FMLA leave.[127]

1) The employer must maintain and pay for the employee's health coverage at the same level and under the same conditions as coverage would have been provided if the employee had been continuously employed during the entire leave period.[128]

> *Example: A covered employer provides group health benefits for its employees by paying 80% of the cost of the premium and requiring the employees to pay the remaining 20% via payroll deduction. However, the employer has a policy of requiring eligible employees who take a qualifying CFRA leave to pay 50% of the premium during the period of time that they are on leave, unless they take leave intermittently. Upon the employee's return to work, the employer resumes payment of the full 80% of the premium.*

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[125] *Repa v. Roadway Exp., Inc.* (7th Cir. 2007) 477 F.3d 938.

[126] The Internal Revenue Code of 1986 defines a "group health plan" as a plan (including a self-insured plan) of, or contributed to by, an employer (including a self-employed person) or employee organization to provide health care (directly or otherwise) to the employees, former employees, the employer, others associated or formerly associated with the employer in a business relationship, or their families." (26 U.S.C. § 5000(b)(1).) If the plan includes dental and eye care, mental health counseling, etc., or includes coverage for the employee and his/her dependents, those components of coverage shall also be continued during the period of leave. (Cal. Code Regs., tit. 2, § 7297.5, subd. (c)(3).)

[127] Cal. Code Regs., tit. 2, § 7297.5, subd. (c).

[128] Gov. Code, § 12945.2, subd. (f)(1); Cal. Code Regs., tit. 2, § 7297.5, subd. (c)(1).

The employer's policy is prominently posted in its employee break room, published in its "Employee Handbook," a copy of which is provided to each employee on an annual basis, and posted on the company's intranet website.

Does the employer's policy regarding group health insurance premiums violate CFRA? Yes. The employer is required to maintain and pay for coverage at the same level and under the same conditions during periods of protected leave as when an employee is working. Therefore, the employer must maintain identical coverage and pay 80% of the cost of the premium during periods of time when employees take CFRA-qualifying leave. The employer may only continue to require its employees to pay 20%, not 50%, of the cost of the premium during leave periods.

2) The employer's obligation to continue health benefits in force for the employee taking leave begins on the date the leave begins and continues for the duration of the leave(s) up to a maximum of 12 workweeks in a 12-month period.[129]

3) The employer may, of course, adopt and implement a more generous policy concerning the continuation of health care benefits, i.e., the employer may voluntarily elect to maintain and pay for health care coverage for the employee during a leave of longer than 12 workweeks.[130]

4) Alternatively, as a condition of continued coverage of group medical benefits beyond the employer's obligation to provide coverage for 12 workweeks, the employer may require the employee to pay the associated premiums at the group rate.[131] The employee may opt not to pay premiums to continue his/her health benefits, but such option shall not constitute a break in service for the purpose of calculating longevity, seniority under a collective bargaining agreement or any employee benefit plan requiring the payment of premiums.[132]

Example: An employer has a policy of allowing employees to take CFRA-qualifying leaves in excess of 12 workweeks, at the conclusion of which the employee is returned to his/her same or a comparable position. The employer

[129] Cal. Code Regs., tit. 2, § 7297.5, subd. (c)(2).
[130] Gov. Code, § 12945.2, subd. (f)(1).
[131] Gov. Code, § 12945.2, subd. (f)(2); Cal. Code Regs., tit. 2, § 7297.5, subd. (e)(1).
[132] Gov. Code, § 12945.2, subd. (f)(2); Cal. Code Regs., tit. 2, § 7297.5, subd. (e)(1)(A).

continues employee group health care benefits during CFRA-qualifying leaves in accordance with the requirements of CFRA, i.e., at the same level and under the same conditions as if the employee had worked continuously during the leave period. The employer does not maintain and pay for an employee's health care benefits during a leave period that extends beyond 12 workweeks. Rather, the employer allows an employee whose leave period is greater than 12 workweeks to maintain his/her health care benefits, and those of his/her dependents, at his/her own cost until he/she returns to work. In other words, if an employee's leave period extends to 20 workweeks, the employer will pay its portion of the premium for only a maximum of 12 workweeks, but will allow the employee to pay the premium for the additional eight weeks in order to maintain coverage.

Is the employer violating CFRA by granting employees a longer than 12-week protected leave period, but not paying its share of employee health care insurance premiums for the entire duration of the leave if it exceeds 12 workweeks? No. The employer is not obligated to provide leaves of longer than 12 workweeks, nor is it required to maintain and pay for employee health insurance coverage for more than that time period. If the employer opts to voluntarily adopt and implement a more generous leave policy, it is not required to adopt a policy regarding health insurance benefits that mirrors the leave policy. The employer may provide broader benefits to its employees in one area without having to also provide them in another.

5) There is no requirement under FEHA that the employer continue health benefits for an employee who takes pregnancy disability leave. Therefore, if the employer is not a CFRA/FMLA-covered employer, there is no requirement that it continue to pay for health care benefits for employees who take pregnancy disability leave *unless* the employer has a policy or precedent of providing health benefits for employees who take temporary disability leaves for reasons other than pregnancy, childbirth or related medical conditions.

<u>Example</u>: A female complainant had a difficult pregnancy. She took six weeks of pregnancy disability leave prior to giving birth, plus an additional six weeks following the birth. At the conclusion of the 12 weeks, she informed her employer of her desire to take CFRA leave for an additional

12 weeks in order to spend time with her newborn. She was an eligible employee working for a covered employer. Thus, during the 12 weeks that she was on pregnancy disability leave she also used her 12 weeks of entitlement to FMLA leave since pregnancy, childbirth and related medical conditions are included in the federal definition of "serious health condition." During the period of FMLA leave, the employer maintained the complainant's health benefits in the same manner as if she had not been on leave, i.e., by paying the entire premium. However, the employer informed her that if she wished to retain her health benefits during her CFRA leave, she would be required to pay the premiums herself. The complainant contends that the employer has an obligation to maintain her health benefits for a maximum of 12 weeks while she takes CFRA-qualifying leave and its refusal to do so violates California law.

The complainant's position is unsupportable. The employer was obligated to continue her health benefits at the same level and under the same conditions as if she had been continuously employed, commencing on the date her FMLA-qualifying leave first began. The employer was required to continue providing benefits for the duration of FMLA-qualifying leave up to a maximum of 12 workweeks in any 12-month period. Therefore, the employee was not entitled to health benefits during her CFRA leave as she had already received benefits for the 12-week maximum. California employers may voluntarily provide greater benefits than are mandated by CFRA, but are not obligated to do so.

6) An employer may not recover premiums paid to maintain group health care coverage during a CFRA-qualifying leave during which the employee continues to be paid.

7) An employer may recover premiums paid to maintain group health care coverage during a CFRA-qualifying leave during which the employee is *not* paid only if both of the following occur:

   a) The employee fails to return to work for any period of time when the leave period to which he/she is entitled has expired – or – he/she returns to work but works less than 30 days after returning; and

   b) The employee's failure to return from leave is for a reason other than the continuation, recurrence, or onset of a serious

health condition that entitles the employee to CFRA leave, or other circumstances beyond the employee's control.[133]

Example: A female employee took a CFRA-qualifying leave for a period of 12 workweeks following the birth of her first child. She had no accrued leave credits. Therefore, the entire leave period was without pay, during which time the employer agreed to continue to pay for and maintain her health insurance benefits even though it was not legally obligated to do so. She returned to work at the end of the 12-week period but, after just two weeks, decided that she could not bear to be away from her infant and wanted to become a "stay-at-home mom." She tendered her resignation, giving the employer two weeks advance notice of her final date of employment. The employer was not happy that the employee opted to discontinue working, but asked her to remain at work for one additional week in order to train her replacement. The employee, wanting to leave on good terms, agreed. Thus, the employee returned to work for a total of five weeks.

May the employer recoup the health care premiums it paid during the employee's CFRA leave? No. The employee worked more than 30 days. Thus, even though the employee's departure was not due to the continuation, recurrence, or onset of a serious health condition or other circumstances beyond her control, i.e., the employee voluntarily resigned, the employer is not entitled to recover any sums expended for the employee's health insurance benefits during her CFRA leave.

e. Other Benefits

While taking CFRA leave, an employee is also entitled to participate in other benefit plans and programs to the same extent and under the same conditions as would apply to any other leave granted by the employer for any reason other than CFRA leave:

1) Health plans for any additional period of leave not covered by Paragraph c above
2) Life insurance plans
3) Short or long-term disability plans
4) Accident insurance
5) Pension and retirement plans

[133] Gov. Code, § 12945.2, subd. (f)(1)(A)-(B); 29 C.F.R. § 825.213(a)(1)-(3).

An employer is not required to make plan payments to any pension and/or retirement plan or to count the leave period for purposes of "time accrued" under any such plan during any *unpaid* portion of a CFRA leave. The employer shall allow an employee covered by a pension and/or retirement plan to continue to make contributions, in accordance with the terms of the plan, during the unpaid portion of CFRA-qualifying leave.[134]

1) Supplemental unemployment benefit plans; and
2) Any other employee benefit plans.[135]

f. Seniority Accrual

While on CFRA leave, an employee is also entitled to accrue seniority, to the same extent and under the same conditions as would apply to any other leave granted by the employer for any reason other than CFRA leave.[136] Thus, if an employer's policy allows employees to accrue seniority when on paid leave, e.g., paid sick leave or vacation, seniority will also accrue during the *paid* portion of CFRA leave.[137]

When an employee returns to work following CFRA leave, he/she returns with *no less* seniority than he/she had when the leave began for the purpose of layoff, recall, promotion, job assignment, and seniority-related benefits like vacation.[138]

g. Workers' Compensation

CFRA does not impact applicable workers' compensation laws, but permits an employer to count industrial disability leave periods as CFRA leave. Therefore, when the work-related injury is a "serious health condition," the employer may charge the leave period against the employee's 12-workweek CFRA entitlement.[139]

3. Reinstatement of Employee to the Same or a Comparable Position Following Leave

Upon the conclusion of an employee's family care and medical leave, the employer shall, unless legally excused from doing so, reinstate him/her to the

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[134] Gov. Code, § 12945.2, subd. (f)(2); Cal. Code Regs., tit. 2, § 7297.5, subd. (e)(2).
[135] Gov. Code, § 12945.2, subd. (f)(2); Cal. Code Regs., tit. 2, § 7297.5, subd. (d).
[136] Gov. Code, § 12945.2, subd. (g); Cal Code Regs., tit. 2, § 7297.5, subd. (d).
[137] Cal. Code Regs., tit. 2, § 7297.5, subd. (d)(2).
[138] Gov. Code, § 12945.2, subd. (g); Cal. Code Regs., tit. 2, § 7297.5, subd. (d)(3).
[139] 29 C.F.R. § 825.207(d)(2).

same position or a position that is comparable, i.e., virtually identical, to that which he/she held prior to the commencement of the leave.

Defenses to the Obligation to Reinstate the Employee to the Same or Comparable Position

a. Employment Would Have Ceased

An employer may be relieved of its duty to reinstate the employee to the same or a comparable position if it can show by a preponderance of the evidence that the employee would not otherwise have been employed at the time reinstatement is requested.[140] The *employer* bears the burden of producing evidence establishing that the employee would not be employed irrespective of his/her exercise of the right to take protected leave.

If an employee is laid off while on CFRA-qualifying leave, i.e., his/her employment is terminated, the employer has no further obligation to continue CFRA leave, maintain the employee's group health plan benefits, or reinstate the employee, subject to any duties of the employer pursuant to an applicable collective bargaining agreement.[141]

Example: A manager of business development for a telecommunications company took CFRA-qualifying leave following the birth of her child. When her request for leave was approved, the employer advised her in writing that so long as she returned to her duties prior to the expiration of her leave entitlement, she would be "returned to [her] position or an equivalent job with equivalent pay, benefits and terms and conditions of employment . . ." Thereafter, the employee was selected for layoff as part of a company-wide workforce reduction based upon the company's ranking of its employees on the basis of skill, performance, and importance to the company (which she did not challenge). She was informed of the company's decision to lay her off prior to the completion of her CFRA leave. She contended that the guarantee she was granted by her employer (cited above) at the time her leave was approved insulated her from layoff and, therefore, her employer violated CFRA when it gave notice of the layoff.

Relying upon the FEHC's Regulations, the court disagreed: "An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the CFRA leave period." (Cal. Code

[140] Cal. Code Regs., tit. 2, § 7297.2, subd. (c)(1).
[141] Cal. Code Regs., tit. 2, § 7297.2, subd. (c)(1)(A).

Regs., tit. 2, § 7297.2, subd. (c)(1).) To accept the employee's argument would elevate the rights of employees taking CFRA leave to a place of superiority over the right of other employees which is not what the law intends. Section 7297.2, subdivision (c), does not create an exception to the employer's continuing employment obligations. Rather, it sets forth the limitation placed on the rights of employees taking CFRA leave.[142]

b. "Key" Employee

An employer may refuse to reinstate an employee returning from leave to the same or a comparable position if all of the following apply:

a) The employee is a salaried employee who is among the highest paid 10 percent of the employer's employees who are employed within 75 miles of the worksite at which that employee is employed.

b) The refusal is necessary to prevent substantial and grievous economic injury to the operations of the employer.

c) The employer notifies the employee of the intent to refuse reinstatement at the time the employer determines the refusal is necessary under subparagraph b).[143]

If the employee's leave has already commenced, the employer shall give the employee a reasonable opportunity to return to work after giving the employee the notice prescribed by subparagraph c) above.[144]

Example: The complainant was employed as a Nursing Home Administrator with a group home when she was diagnosed with a serious disorder that required her to undergo surgery. It was undisputed that her salary placed her among the highest paid 10 percent of the employer's employees and one of the requirements of her position was possession of a State-issued license. Under applicable law, the group home could not operate without an individual occupying that position who possessed a valid license, otherwise it risked also losing its State-issued license. When the complainant advised her supervisor of her need for a leave of approximately six weeks' duration, the supervisor responded, "I cannot afford to have you off work that long." The employer granted the complainant's request for CFRA-qualifying leave and

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[142] *Tomlinson v. Qualcomm, Inc.* (2002) 97 Cal.App.4th 934.

[143] Gov. Code, § 12945.2, subd. (r)(1)(A)-(C); Cal. Code Regs., tit. 2, § 7297.2, subd. (c)(2)(A)-(D).

[144] Gov. Code, § 12945.2, subd. (r)(2).

refused to reinstate her to her position at the conclusion of the leave, instead offering her a position which was not comparable because it provided a lower salary, inferior benefit and different duties.

The employer contended that it was legally excused from reinstating the complainant to the same or a comparable position because she was a "key" employee: a) She was among the highest paid 10 percent of its employees, all of whom were assigned to the same worksite as the complainant; b) during her CFRA-qualifying leave, it had to fill her position in order to prevent substantial and grievous economic injury to its operations, i.e., the risk of losing its own license if the position remained vacant) and no candidate who held a license could be located who was willing to work on a temporary basis; and c) the employer notified the employee timely of its intent to refuse to reinstatement her to the same or a comparable position at the conclusion of the leave.

K. Relationship Between CFRA Leave and Pregnancy Disability Leave

The FEHA provides eligible employees the right to take a CFRA-qualifying, protected leave, as well as the right to take a leave because of pregnancy, childbirth or related medical condition(s).[145] The two rights are separate and distinct from each other and must be analyzed accordingly.[146]

An employee's own disability because of pregnancy, childbirth or related medical condition(s) is <u>not</u> included within the definition of "serious health condition" for the purpose of determining whether or not a female employee is entitled to CFRA leave.[147]

A woman who is disabled by pregnancy, disability or related medical condition(s) may take a pregnancy disability leave of up to four months. At the end of the period of pregnancy disability leave, the woman may request a CFRA leave of up to 12 weeks if she is otherwise eligible, as discussed above, and the child has been born by that date.[148]

1. Neither the employee requesting leave nor her child need have a serious health condition in order to qualify for CFRA leave.[149]

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[145] Gov. Code, § 12945; Cal. Code Regs., tit. 2, § 7297.2.
[146] Cal. Code Regs., tit. 2, § 7297.6, subd. (a).
[147] Cal. Code Regs., tit. 2, § 7297.6, subd. (b).
[148] Gov. Code, § 12945.2, subd. (s); Cal. Code Regs., tit. 2, § 7297.6, subd. (c).
[149] Gov. Code, § 12945.2, subd. (s); Cal. Code Regs., tit. 2, § 7297.6, subd. (c).

2. The employee need no longer be disabled by pregnancy, childbirth or related medical condition(s). For this reason, this type of leave is frequently referred to as "bonding leave" or "birth and bonding leave."[150]

A woman who takes pregnancy disability leave, followed by CFRA-qualifying "bonding leave," is entitled to a *maximum* leave period of four months and 12 workweeks.[151]

> *Example: An eligible pregnant employee takes an eight-week CFRA-qualifying leave to care for her spouse who has a serious health condition. She returns to work for two months, at which time her health care provider certifies her as disabled due to pregnancy. Six weeks later, she has a normal delivery and is certified disabled for an additional six weeks due to childbirth. She would like to stay home for as long as possible in order to continue bonding with her newborn. What is the maximum length of CFRA-qualifying leave the employee can enjoy for the purpose of bonding?*
>
> *The employee utilized eight of the total of 12 weeks to which she is annually entitled under CFRA for the purpose of caring for her husband. The six weeks before and six weeks after the birth of her child constitute pregnancy disability leave. Once her employer deemed her physically able to resume performing the essential functions of her position, her pregnancy disability leave terminated. Therefore, she is entitled to an additional four weeks of CFRA-qualifying leave for the purpose of bonding with her newborn. Under CFRA, pregnancy is not a "serious health condition" and pregnancy disability leave does not run concurrently with CFRA-qualifying leave.*
>
> *Example: In the example above, assume that the employer utilizes the calendar year for the purpose of computing the 12-month period in which employee leave entitlement accrues. Assume that the pregnant employee took an eight-week CFRA-qualifying leave to care for her spouse during the months of October and November. She then returned to work at the beginning of December and worked for two months before commencing pregnancy disability leave at the beginning of February.*
>
> *Would the employee be able to enjoy a longer CFRA-qualifying leave for the purpose of bonding with her newborn? Yes, because the above example assumes that all events occur in the same calendar year. On January 1, the employee's 12-week annual leave entitlement began anew. So long as she remained otherwise eligible, she would be entitled to take a 12-week leave in order to bond with her newborn, commencing at the conclusion of her pregnancy disability leave. Therefore, including the six-week period during which her health care provider certified her as disabled by childbirth*

[150] Gov. Code, § 12945.2, subd. (s); Cal. Code Regs., tit. 2, § 7297.6, subd. (c).
[151] Cal. Code Regs., tit. 2, § 7297.6, subd. (d).

following the delivery, she would be able to remain at home with the child for a total of 18 weeks, rather than the maximum of 10 in the example above.

If the woman's child has not been born by the time she utilizes four months of pregnancy disability leave, but her health care provider determines that a continuation of leave is medically necessary, the employer may, but is not required to, allow an otherwise eligible employee to utilize CFRA leave. Even if the employer permits the employee to take such a leave, however, it does not have to grant the employee more CFRA leave, i.e., longer than the equivalent of 12 workweeks, than she would otherwise be entitled to.[152]

Example: An eligible pregnant employee experiences complications such that her health care provider directs her to remain on bed rest for the remainder of her pregnancy. She is just four months into the pregnancy. What are her rights with respect to leave and the ability to return to her position following delivery of the child and recovery therefrom?

Unfortunately for the employee, the law requires that the employee be granted a maximum of four months pregnancy disability leave. Given that she is only four months into the pregnancy at the time she experiences complications, the employer cannot be forced to allow her to take a CFRA-qualifying leave at the end of that period, even though she will not yet have given birth.

Under these facts, the employer would be encouraged to permit the otherwise eligible employee to utilize CFRA leave to cover the remainder of her pregnancy, delivery, and recovery. However, the employer might be able to lawfully terminate the employee's employment at the conclusion of the four-month pregnancy disability leave due to her inability to resume performing the essential functions of her position. Among the necessary inquiries are:

a. How does the employer deal with employees who are temporarily disabled for reasons other than pregnancy?
b. What is the maximum duration of leave granted to such employees?
c. Have any other employees experienced complications from pregnancy which caused them to be off work for more than four months?
d. How did the employer handle those situations, if any?
e. Was additional leave granted?
f. Is there an applicable collective bargaining agreement and, if so, what provision(s), if any, might be applicable?

Example: A pregnant employee meets CFRA eligibility requirements with one exception – at the time she begins pregnancy disability leave, she has

[152] Cal. Code Regs., tit. 2, § 7297.6, subd. (c)(1).

been employed for a period of less than 12 months. She has, however, worked more than 1,250 hours. She commences pregnancy disability leave during which her "anniversary date" passes. She delivers the child, concludes her pregnancy disability leave, and then requests CFRA-qualifying leave for the purpose of bonding with her newborn. The employer denies her request on the ground that she did not meet CFRA eligibility requirements before beginning leave.

Has the employer violated CFRA? Yes. During a pregnancy disability leave, an employee retains her status as an employee. The employee had worked the requisite 1,250 hours before commencing pregnancy disability leave. An employee's request for CFRA-qualifying leave is evaluated as of the date that the leave will begin. As of that date, the employee had more than 12 months of service with the employer.

Example: In the example above, assume that the employee had worked less than 1,250 hours prior to commencing pregnancy disability leave. Must the employer grant the employee's request for CFRA-qualifying leave immediately following the conclusion of her pregnancy disability leave? No. An employee must have "actually worked" at least 1,250 hours in the 12 months prior to the commencement of the protected leave. The fact that the employee celebrated her "anniversary date" and has been employed more than 12 months at the time of requesting leave does not cure the fact that she has not worked the requisite number of hours to be eligible for CFRA-qualifying leave. Both requirements must be met in order for the employee to be deemed "eligible" for CFRA-qualifying leave.

L. Retaliation Prohibited

As noted above, an employer may not take an adverse employment action against an employee because that employee has:

1. Exercised his/her right to take CFRA leave; and/or

2. Given information or testimony regarding his/her CFRA leave or another person's CFRA leave in any inquiry or proceeding related to any right guaranteed by FEHA and FEHC's Regulations.[153]

   An "inquiry or proceeding" would include, but not be limited to an employer's internal investigation into a complaint concerning CFRA leave, a DFEH investigation into a complaint alleging CFRA violation(s), a response to a valid and enforceable subpoena, an administrative or civil hearing or trial.

Impermissible adverse actions include, but are not limited to:

[153] Cal. Code Regs., tit. 2, § 7297.7.

1. Discharge from or termination of employment
2. Assessment of a fine or other financial penalty
3. Suspension
4. Expulsion
5. Punishment
6. A refusal to hire
7. Another form of discrimination[154]

Example: An employee was diagnosed with diabetes and granted CFRA-qualifying leave on an intermittent basis for medical appointments, testing and treatments. She claimed, however, that after her diagnosis and exercise of her right to CFRA leave, she was subjected to retaliation, the stress of which aggravated her condition and resulted in the need to take even more time off. Specifically, she contended that she was subjected to criticism and "leave control," i.e., required to account for every absence in a manner not required of other employees. She was subjected to adverse actions in the form of a salary reduction, 10-day suspension and, ultimately, termination of her employment.

The employer contended that she was not eligible for CFRA leave, having already exhausted her leave entitlement. However, the court found that a prima facie case of retaliation may be demonstrated if the complainant takes CFRA leave and is then subjected to adverse action because of having exercised that right. Whether, at the time retaliation is alleged, the complainant has any right to take additional protected leave is not a relevant inquiry. The employer may defend a claim of retaliation for having exercised a protected right only by demonstrating that the adverse action at issue was taken for legitimate, nondiscriminatory reason(s).[155]

An employer is not precluded from subjecting employees to discipline for legitimate, nondiscriminatory reasons, even though the employee has taken CFRA-qualifying leave.

Example: The employee requested and was granted CFRA leave to care for his father during and after undergoing surgery. However, while on CFRA

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[154] Cal. Code Regs., tit. 2, § 7297.7.

[155] *Dudley v. Department of Transp.* (2001) 90 Cal.App.4th 255; *Dudley v. Department of Transportation* (2004) 2004 WL 1701216. [Note: The case is an unpublished decision which may not be cited as persuasive authority before any administrative tribunal or court.] Ultimately, the court found that the complainant had received at least 12 weeks of protected leave, i.e., the maximum to which she was entitled, along with continued health benefits and reinstatement rights. Therefore, the court, in reliance upon *Ragsdale v. Wolverine World Wide, Inc.* (2002) 535 U.S. 81, refused to "fashion a remedy that eliminates her burden to show impairment of her CFRA rights and resulting prejudice, and that expands the basic guarantee of CFRA well beyond 12 weeks of medical leave."

leave, he spent an afternoon playing golf and worked intermittently over the course of three days on his sprinkler system. The complainant drove his father back to his place of business where his father retrieved his vehicle and drove home alone but the complainant did not report to work the next morning, reporting that he needed to stay home that day to care for his pregnant wife because she injured her back. After the complainant's employment was terminated, he contended that his employer had retaliated against him for exercising his right to take CFRA leave. The employer claimed the complainant was fired for legitimate, nondiscriminatory reasons, i.e., his untruthfulness and abuse of leave time. The court found that the employer terminated the complainant's employment due to a good-faith, reasonable belief that he had abused his CFRA leave and provided false answers to the employer's investigators, rejecting the complainant's contention that the employer had failed to adequately inform him about the parameters under which his leave request was granted.[156]

The use of CFRA leave may not be cited as a negative factor in an employee's performance evaluation, nor should the use of CFRA leave be considered by an employer when making employment decisions or taking employment action, for instance, hiring, promoting, imposing discipline, etc.

Rather, an employee's job performance should be based on work *actually performed*. Therefore, a performance review should not mention the fact that an employee has taken CFRA leave or negatively comment upon the employee's performance because of the leave. Employers are free to comment, of course, upon an employee's record of attendance, as well as the quality and quantity of work performed by the employee when not on CFRA leave.[157]

Example: A female employee took a two-month CFRA-qualifying leave to care for her mother. She was off work in January and February. Later that year, she took a pregnancy disability leave after the doctor ordered her to remain on bed rest upon discovering that she was carrying triplets. Her pregnancy disability leave spanned nearly four full months, beginning in early November and concluding near the end of February. Immediately following her pregnancy disability leave, the employee commenced a 12-week CFRA-qualifying leave in order to remain at home with her newborns, at the conclusion of which the employer reinstated her to the same position she held prior to taking leave.

The employee's supervisor made no mention of the employee having taken leave to care for her mother in the written performance evaluation she provided the employee in June of that year, i.e., approximately three (3) months after the employee returned from the first CFRA leave. In fact, the

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156 *McDaneld v. Eastern Municipal Water District Board* (2003) 109 Cal.App.4th 702.
157 29 C.F.R. § 825.220(c).

employee received "outstanding" ratings in all categories. However, the following June, shortly after the employee returned from taking pregnancy disability leave, followed by CFRA-qualifying leave, the supervisor rated her performance as only "satisfactory" in several categories. On the issue of attendance, the supervisor rated the employee "satisfactory" but included a footnote stating: "Employee's attendance pattern is satisfactory when she works. For instance, she is punctual and does not abuse the company sick leave policy. However, in the past year, she has taken several leaves of absence for non-work-related matters and her absences have placed a strain on the department. Other employees had to perform employee's duties because she was not here, even requiring some of them to work overtime. That has negatively impacted morale within the department – some of employee's co-workers resented the fact that she was not here to pull her own weight. I am hopeful that employee will not be taking any further leaves of absence in the foreseeable future so that her rating in this area can improve over the course of the coming year."

Has the employer violated the FEHA by including the above verbiage in the employee's performance evaluation? Yes, the employer has retaliated by taking an adverse action against the employee because she exercised her right to take protected leaves. California courts have deemed the issuance of and placement in an employee's personnel file of a derogatory performance evaluation to be an adverse action.

ANALYTICAL OUTLINE

I. Jurisdiction

Does DFEH have jurisdiction over the complaint and parties?[158]

II. Elements of the Prima Facie Case of Discrimination

A. Denial of CFRA Leave

1. Was the employer a covered employer?

2. Was the employee who requested CFRA leave an eligible employee?

3. Did the eligible employee request leave for a CFRA-qualifying purpose?

4. Was the request for leave reasonable, i.e., in compliance with any application notice requirements and accompanied, as required, by certification of the employee's need for leave?

5. Did the employer deny the eligible employee's request for CFRA leave?[159]

B. Failure to Reinstate to the Same or Comparable Position Following CFRA Leave

1. Was the employer a covered employer?

2. Was the employee an eligible employee?

3. Did the employee request and the employer grant leave for a CFRA-qualifying purpose?

4. At the conclusion of the leave, did the employer fail to return the employee to the same position he/she held before commencing leave or to a comparable position (virtually identical) position? and

5. Does any affirmative defense excuse the employer's failure to reinstate the complainant to his/her same position or a comparable position at the conclusion of CFRA-qualifying leave?

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[158] See chapter entitled "Jurisdiction."
[159] Cal. Code Regs., tit. 2, § 7297.1, subd. (b)(1).

C. Retaliation for Exercising Right to CFRA Leave

1. Was the employer a covered employer?

2. Was the employee an eligible employee?

3. Did the employee exercise his/her right to take leave for a qualifying purpose? and

4. Was the employee subjected to an adverse employment action, such as termination of employment, fine or suspension because of his/her exercise of his/her right to CFRA leave?

III. Affirmative Defenses

A. Failure to Reinstate to the Same or Comparable Position Following Leave

Can the employer demonstrate that the employee would not otherwise have been employed in the same or a comparable (virtually identical) position at the time reinstatement is requested due to legitimate business reasons unrelated to the employee having taken CFRA-qualifying leave?

A position is “available” if the answer to all of the following questions is “yes:”

1. Was the employee qualified for the position or entitled to it by company policy, contract, or collective bargaining agreement?

2. Was the position open on the employee’s scheduled date of reinstatement or within 10 working days thereafter? and

3. Was the employee qualified for the position?

B. Key Employee

Can the employer demonstrate that it refused to reinstate the employee returning from leave to the same or a comparable position because all of the following were applicable?

1. The employer was a salaried employee who was among the highest paid 10 percent of the employer's employees who were employed within 75 miles of the worksite at which that employee was employed.

2. The refusal was necessary to prevent substantial and grievous economic injury to the operations of the employer.

3. The employer notified the employee of the intent to refuse reinstatement at the time the employer determined the refusal is necessary under subparagraph 2.

4. If the employee's leave had already commenced, the employer gave the employee a reasonable opportunity to return to work after giving the employee the notice prescribed by subparagraph 2 above.

EXPLANATION OF ANALYTICAL OUTLINE

I. Jurisdiction

Does DFEH have jurisdiction over the complaint and parties?[158]

II. Elements of the Prima Facie Case of Discrimination

A. Denial of CFRA Leave

1. Was the employer a covered employer?

   Relevant questions to be answered include, but are not limited to:

   At the time that the complainant requested CFRA-qualifying leave, did the employer directly employ 50 or more persons to perform services for a wage or salary or was the employer the State, and any political or civil subdivision of the State and cities?

   Evidence to be gathered/analyzed includes, but is not limited to:

   Documents demonstrating the number of persons employed by the employer and the locations where those employers are assigned to work, including but not limited to:

   a. Payroll records
   b. Personnel records pertaining to employee work histories and/or leave balances
   c. Tax returns
   d. Reports submitted to governmental entities, e.g., Employment Development Department, Public Utilities Commission
   e. Reports submitted to unions/collective bargaining units, e.g., reports accompanying pension contributions
   f. Employer publications, e.g., brochures, catalogues, internet sites, promotional materials

2. Was the employee who requested CFRA leave an eligible employee?

   Relevant questions to be answered include, but are not limited to:

   a. Was the employee a full- or part-time employee working in California?

   b. Did, as of the date the leave was requested, the employee have more than 12 months (52 weeks) of service with the employer at any time?

c. Had, as of the date the leave was requested, the employee worked for the employer at least 1,250 hours during the 12-month period immediately prior to the date the leave was to begin?

d. Had the employee previously exhausted his/her right to take CFRA leave within the relevant time period?

Evidence to be gathered/analyzed includes but is not limited to:

Documents evidencing the length of employee's tenure with the employer and number of hours worked during the 12-month period immediately prior to the date the leave was to begin, including but not limited to:

a. Employee's W-2s
b. Employee's tax returns
c. Employee's pay stubs
d. Employer's payroll or personnel records pertaining to employee leave balances
e. Reports submitted by the employer to governmental entities, e.g., Employment Development Department, Public Utilities Commission
f. Reports submitted by the employer to unions/collective bargaining units, e.g., reports accompanying pension contributions
g. Employer publications, e.g., brochures, catalogues, internet sites, promotional materials in which employee is mentioned

3. Did the employee request leave for a CFRA-qualifying purpose?

Relevant questions to be answered include, but are not limited to:

Did the employee request leave because:

a. He/she had a serious health condition, *other than pregnancy, childbirth or a related medical condition,* that made him/her unable to perform the functions of his/her position?
b. She or her partner gave birth of a child?
c. A child was placed with the employee in connection with his/her adoption of the child?
d. A child was placed with the employee in connection with his/her becoming the child's foster parent?

e. He/she needed to care for a family member with a serious health condition?

    1) Spouse
    2) Registered domestic partner

3) Child
4) Parent

Evidence to be gathered/analyzed includes but is not limited to:

a. Documentation from employee's health care provider demonstrating that he/she had a serious health condition *other than pregnancy, childbirth or a related medical condition,* that made him/her unable to perform the functions of his/her position

b. Documentation from the health care provider of the employee's qualifying family member demonstrating that he/she had a serious health condition warranting the participation of the employee to provide care during a period of treatment or supervision

c. Documentation of the required relationship between the employee and the qualifying family member, such as:

1) Birth or baptismal certificate
2) Adoption application or decree
3) Marriage certificate
4) Written evidence of the foster parent-child relationship
5) Written evidence that the employee stands in loco parentis to the child such as correspondence, letters, memoranda, e-mails
6) Domestic partner registration
7) Affidavits or statements from person(s) having knowledge of the relationship between the employee and the qualifying family member, such as a pastor or priest, other family members, neighbors

Interviews to be conducted:

Persons who can verify the nature of the relationship between the employee and the qualifying family member such as a pastor or priest, other family members, neighbors.

4. Was the request for leave reasonable, i.e., in compliance with any application notice requirements and accompanied, as required, by certification of the employee's need for leave?

Relevant questions to be answered include, but are not limited to:

a. Did the employer have a CFRA policy in place?

b. Was the policy posted in the workplace?

c. Was a copy of the policy distributed to its employees, including the complainant?

d. Did the employer provide notice to his/her employee of his/her need for leave?

e. Was the notice provided by the employee to the employer sufficient to put the employer on notice of the fact that the leave might be CFRA-qualifying?

    1) When was the notice provided?
    2) By what means?
    3) By whom?
    4) How many times?
    5) Did the notice provided comply with the terms of the employer's CFRA policy?

        a) Does the employer contend that the notice failed to comply with its policy? In what respect(s)?
        b) Does the employee agree that he/she did not provide notice to the employer in conformity with the employer's policy?
        c) If so, does the employee contend that there were extenuating circumstances which made it impossible or impracticable for him/her to comply, e.g., a medical emergency?

f. Did the employer request that the employee provide certification from a health care provider of the need for leave?

    1) Does the employer contend that the employee failed to comply with the request?
    2) Does the employee agree that he/she did not comply with the employer's request for certification from a health care provider of his/her need for leave?
    3) If so, does the employee contend that there were extenuating circumstances which made it impossible or impracticable for him/her to comply?

g. Does the employer contend that the documentation provided by the health care provider was not legally sufficient, i.e., did not set forth all information required by the FEHA to be disclosed to the employer?

1) If so, did the employer request that the employee provide additional/further information?
2) How many times?
3) By what means?

h. Did the employee respond?

i. Does the employee contend that the documentation provided by the health care provider was legally sufficient, i.e., set forth all information required by the FEHA to be disclosed to the employer?

j. Does the employee dispute that the employer requested additional/further information?

Evidence to be gathered/analyzed includes but is not limited to:

a. Documentation of the employee's request(s) for leave:

1) CFRA request form or application
2) Notes, memoranda, correspondence, e-mails verifying the date and manner by which the employee requested leave, as well as what substantive information the employee communicated regarding the need for leave
3) Voicemail or answering machine messages (or transcripts thereof)

b. Documentation of the employer's request(s) for certification from a health care provider of the need for leave:

1) CFRA form(s) utilized by the employer
2) Notes, memoranda, correspondence, e-mails
3) Voicemail or answering machine messages (or transcripts thereof)

c. Documentation provided to the employer from the employee's health care provider demonstrating that he/she had a serious health condition *other than* pregnancy, childbirth or *a* serious health condition

d. Documentation provided to the employer from the health care provider of employee's eligible family member warranting the participation of the employee to provide care during a period of treatment or supervision

e. Documentation of the employer's request(s) for additional/further information from a health care provider of the need for leave

1) CFRA form(s) utilized by the employer
2) Notes, memoranda, correspondence, e-mails
3) Voicemail or answering machine messages (or transcripts thereof)

f. Documentation of the employee's compliance with the employer's request for additional/further information

g. All documentation provided to the employer from the employee's health care provider demonstrating that he/she had a serious health condition *other than* pregnancy, childbirth or a serious health condition

h. All documentation provided to the employer from the health care provider of employee's eligible family member warranting the participation of the employee to provide care during a period of treatment or supervision

Interviews to be conducted:

a. Person(s) who witnessed the employee providing notice to the employer orally or in writing of his/her need for leave

b. Person(s) who communicated with the employer on the employee's behalf, e.g., if the employee was medically incapacitated and unable to contact the employer

c. Health care provider(s) (or his/her staff) who provided certification and/or additional/further information or clarification to the employer

5. Did the employer deny the eligible employee's request for CFRA leave?

Relevant questions to be answered include, but are not limited to:

a. What rationale/justification does the employer offer for having denied the employee's request for leave?

b. Does the employer's position appear to be factually accurate, i.e., supported by competent evidence?

c. What additional evidence, if any, does the employee proffer in support of his/her contention that the employer's denial of leave was unlawful?

Evidence to be gathered/analyzed includes but is not limited to:

a. Documents identifying the employer's decision-maker(s)

b. Notes, minutes or other documentation of meetings, discussions or conferences at which the employee's request for leave was considered, evaluated, contemplated

c. All documentation available to the employer's decision-maker(s) at the time he/she/they considered, evaluated or contemplated the employee's request for leave

d. Notes, memoranda, correspondence, e-mails, voicemails, answering machine message(s) (or the transcripts thereof) communicating the employer's denial of the employee's request for leave

e. Notes, memoranda, correspondence, e-mails, voicemails, answering machine message(s) (or the transcripts thereof) from the employee protesting the employer's denial of his/her request for leave

Interviews to be conducted:

Employer's decision-maker(s) who considered, evaluated or contemplated the employee's request for leave

B. Failure to Reinstate to the Same or Comparable Position Following Leave

1. Was the employer a covered employer?

   Same as above.

2. Was the employee an eligible employee?

   Same as above.

3. Did the employee request and the employer grant leave for a CFRA-qualifying purpose?

   Same as above.

4. At the conclusion of the employee's CFRA leave, did the employer fail to return him/her to the same position he/she held before commencing leave or to a comparable (virtually identical) position?

Relevant questions to be answered include, but are not limited to:

a. What position did the employee hold prior to taking CFRA leave?

    1) How many individuals were employed in the same position?
    2) At what location(s) were those individuals employed in the same position?

b. Was there any change in the composition of the employer's workforce and positions during the employee's CFRA-qualifying leave?

c. How did the employer compensate for the employee's absence during his/her CFRA-qualifying leave?

d. What were the terms and conditions under which the employee was granted leave?

e. Did the employee ask, at the time he/she requested leave, the employer to guarantee, in writing or otherwise, that he/she would be reinstated to the same or a comparable position at the conclusion of the leave?

f. Was the employee aware of his/her right to request that the employer guarantee he/she would be reinstated to the same or a comparable position at the conclusion of the leave?

g. At what point in time did the employer determine not to return the employee to the same position he/she held before commencing leave or a comparable position?

h. Who was the decision-maker(s) that determined not to return the employee to the same position he/she held before commencing leave or a comparable position?

i. What information did the decision-maker(s) consider, evaluate, review, discuss, contemplate when considering whether to return the employee to the same position he/she held before commencing leave or a comparable position?

j. When and by what means did the employer notify the employee that he/she would not be returned to the same position he/she held before commencing leave or a comparable position?

k. What rationale/justification did the employer provide when communicating to the employee its decision not to return him/her to

the same position he/she held before commencing leave or a comparable position?

l. Does the employer offer the same rationale/justification now?

m. Does the employer's rationale/justification appear to be factually accurate, i.e., supported by competent evidence?

n. Did the employee attempt to resolve the dispute with the employer, i.e., did the employee ask the employer to rescind its decision not to return him/her to the same or a comparable position and allow him/her to resume his/her employment? If so, what was the employer's further response, if any?

o. Has any other employee(s) taken CFRA leave and, at the conclusion of that leave, been reinstated to the same position he/she held prior to the leave or a comparable position?

Evidence to be gathered/analyzed includes but is not limited to:

a. Employer's payroll records

b. Employer's personnel records

c. Reports submitted by the employer to governmental entities, e.g., Employment Development Department, Public Utilities Commission

d. Reports submitted by the employer to unions/collective bargaining units, e.g., reports accompanying pension contributions

e. Employer publications, e.g., brochures, catalogues, internet sites, promotional materials in which the employer declaring the size and/or composition of its workforce (number of positions, locations, etc.)

f. Documents identifying the employer's decision-maker(s)

g. Notes, minutes or other documentation of meetings, discussions or conferences at which reinstatement of the employee following leave was considered, evaluated, contemplated

h. All documentation available to the employer's decision-maker(s) at the time he/she/they considered, evaluated or contemplated reinstatement of the employee to the same position he/she held prior to taking leave or a comparable position

i. Notes, memoranda, correspondence, e-mails voicemails, answering machine message(s) (or the transcripts thereof) communicating the employer's decision not to reinstate the employee to the same position he/she held prior to taking leave or a comparable position

j. Notes, memoranda, correspondence, e-mails, voicemails, answering machine message(s) (or the transcripts thereof) from the employee protesting the employer's denial of his/her request for reinstatement

k. Notes, memoranda, correspondence, e-mails, voicemails, answering machine message(s) (or the transcripts thereof) documenting the employer's response to the employee's protest(s)

l. Documents pertaining to CFRA-qualifying leaves taken by other employee(s) who were reinstated to the same position(s) he/she held prior to taking the leave or comparable position(s)

m. Documents pertaining to CFRA-qualifying leaves taken by other employee(s) who were not reinstated to the same position(s) he/she held prior to taking the leave or comparable position(s)

Interviews to be conducted:

a. Employer's decision-maker(s)

b. Other employees who took CFRA-qualifying leaves and were reinstated, at the conclusion of the leaves, to the same positions held prior to the leave or comparable positions

c. Other employees who took CFRA-qualifying leaves and were not reinstated, at the conclusion of the leaves, to the same positions held prior to the leave or comparable positions

d. Employee's co-workers who can attest to staffing levels during the employee's CFRA-qualifying leave and after the employer refused to return the employee, at the conclusion of the leave, to the same position he/she held prior to the leave or a comparable position

5. Does any affirmative defense excuse the employer's failure to reinstate the complainant to his/her same or a comparable (virtually identical) position at the conclusion of CFRA-qualifying leave?

C. Retaliation for Exercising Right to CFRA Leave

1. Was the employer a covered employer?

   Same as above.

2. Was the employee an eligible employee?

   Same as above.

3. Did the employee exercise his/her right to take lave for a qualifying purpose?

   Same as above, and

4. Was the employee subjected to an adverse employment action, such as termination of employment, fine or suspension because of his/her exercise of his/her right to CFRA leave?

Relevant questions to be answered/evidence to be gathered/analyzed:

Identify the specific act of harm in question. Then refer to and modify, as appropriate, the list of relevant questions presented in the Chapter entitled "Retaliation."

III. Affirmative Defenses

A. Failure to Reinstate to Same or Comparable Position

Can the *employer* demonstrate that the employee would not otherwise have been employed in the same or a comparable (virtually identical) position at the time reinstatement is requested due to legitimate business reasons unrelated to the employee having taken CFRA-qualifying leave?

The *employer* always bears the burden of establishing, by a preponderance of the evidence, the viability of the defense.

Relevant questions to be answered include, but are not limited to:

1. What "legitimate business reason(s)" does the employer assert to explain why the employee would not otherwise have been employed at the conclusion of his/her CFRA-qualifying leave?

2. What position did the employee hold prior to taking CFRA-qualifying leave?

3. How many individuals were employed in the same or a comparable position?

4. How many individuals were employed in the same or a comparable position as of the date the employee requested reinstatement?

5. What factor(s) account for any change in the number of individuals employed in the same or a comparable position on the date the employee requested reinstatement?

6. How did the employer compensate for the employee's absence during his/her CFRA-qualifying leave?

7. Does any evidence suggest that the factor(s) cited by the employer are pretextual?

    a. Was the employee "valued" by the employer, i.e., were his/her employment performance reviews satisfactory?
    b. Was he/she subjected to any form of discipline prior to commencing CFRA-qualifying leave?
    c. Have one of more of the decision-makers made any statements or comments orally or in writing that suggest the employer simply wanted to "get rid" of the employee?
    d. Was any wrongdoing by the employee discovered by the employer during his/her CFRA-qualifying leave?

<u>Evidence to be gathered/analyzed includes but is not limited to</u>:

1. Employer's payroll records

2. Employer's personnel records showing staffing levels / workforce allocation

3. Duty statements

4. Job descriptions

5. Employee's personnel records

    a. Performance evaluations or similarly titled documents
    b. Memoranda, notes, correspondence or e-mails showing any discipline to which the employee was subjected
    c. Corrective action plan(s) or similarly titled documents

6. Personnel records, including documentation pertaining to protected leaves, of other employees in the same position or job classification as

the employee whose employment was not terminated at the same time as the employee's

7. Personnel records, including documentation pertaining to protected leaves, of other employees in the same position or job classification as the employee whose employment was terminated at the same time as the employee's

8. Reports submitted by the employer to governmental entities, e.g., Employment Development Department, Public Utilities Commission

9. Reports submitted by the employer to unions/collective bargaining units, e.g., reports accompanying pension contributions

10. Employer publications, e.g., brochures, catalogues, internet sites, promotional materials

11. Documents identifying the employer's decision-maker(s)

12. Notes, minutes or other documentation of meetings, discussions or conferences at which reinstatement of the employee following leave was considered, evaluated, contemplated

13. All documentation available to the employer's decision-maker(s) at the time he/she/they considered, evaluated or contemplated reinstatement of the employee to the same position he/she held prior to taking leave

14. All documents relevant to the employer's asserted justification for not returning the employee to the same position he/she held prior to commencing leave:

    a. Income or profit and loss statements
    b. Balance sheets
    c. Asset and debt schedules
    d. Statements of change in financial condition
    e. Payroll reports
    f. Budgets
    g. Financial forecasts
    h. Directives from a parent company
    i. Collective bargaining agreement(s)
    j. Statute, regulation or rule
    k. Court order
    l. Medical records or written opinion(s) of health care providers

Interviews to be conducted:

1. Employer's decision-maker(s)

2. Person(s) who witnessed the employer's decision-maker(s)' comment(s), remark(s) or statement(s) regarding the rationale for termination of the employee's employment

3. Other employees who took CFRA-qualifying leaves and were reinstated, at the conclusion of the leave, to the same positions held prior to the leave or comparable positions

4. Other employees who took CFRA-qualifying leaves and were not reinstated, at the conclusion of the leave, to the same position held prior to the leave or comparable positions

5. Other employees who took CFRA-qualifying leaves and whose employment was terminated at the same time as the employee's

6. Other employees who took CFRA-qualifying leaves and whose employment was not terminated at the same time as the employee's

7. Employee's co-workers who can attest to staffing levels during the employee's CFRA-qualifying leave and after the employer refused to return the employee to his/her position following the leave or a comparable position

B. Key Employee

Can the *employer* demonstrate that it refused to reinstate the employee returning from leave to the same or a comparable position because all of the following were applicable?

Note: The employer always bears the burden of establishing the viability of the defense by a preponderance of the evidence.

1. The employer was a salaried employee who was among the highest paid 10 percent of the employer's employees who were employed within 75 miles of the worksite at which that employee was employed.

2. The refusal was necessary to prevent substantial and grievous economic injury to the operations of the employer.

3. The employer notified the employee of the intent to refuse reinstatement at the time the employer determined the refusal is necessary under subparagraph 2.

4. If the employee's leave had already commenced, the employer gave the employee a reasonable opportunity to return to work after giving the employee the notice prescribed by subparagraph 2 above.